
Building Relationships and Advancing Reconciliation through Meaningful Consultation

**Report to the Minister of Indigenous
and Northern Affairs**

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EXECUTIVE SUMMARY

More than a decade ago, the Supreme Court of Canada recognized the Crown's constitutional duty to consult. It requires the federal, provincial, and territorial governments to consult and, where appropriate, accommodate Aboriginal communities whenever they contemplate decisions that may adversely impact asserted or established Aboriginal or treaty rights.

This has been a contentious and litigious area due to the lack of clarity and consensus on what is required in a given situation. Since 2004, there have been hundreds of cases in which Aboriginal groups have gone to court to challenge an alleged lack of adequate consultation and/or accommodation on decisions by the federal, provincial or territorial governments. The majority of these cases have been about resource development. They represent only a small portion of the many unfortunate disagreements between Aboriginal groups, governments, and industry in this area. These disputes have had substantial costs to all parties involved and have negatively impacted relationships between Aboriginal groups and governments in Canada. They have also created significant uncertainty for resource development and investment.

In May 2015, the then Minister of Aboriginal Affairs and Northern Development Canada, the Honourable Bernard Valcourt, asked me to engage with Aboriginal groups and organizations, industry, and federal, provincial and territorial officials on how Canada could improve its approach to the duty to consult and to seek input on three related guidance documents for federal officials and industry.

From May until August 2015, I met with or received submissions from representatives of 70 Aboriginal groups and organizations across the country as well as 19 resource development companies and industry associations. I also met with officials from 15 federal departments and agencies and four provinces.¹ I was unable to complete all scheduled meetings due to the timing of the federal election. Indigenous and Northern Affairs Canada has, however, asked me to report on the substantial portion of the engagement that I did complete.

The comments that I received in this engagement were largely critical of Canada's approach. Aboriginal groups overwhelmingly felt that the federal government, with the exception of Parks Canada, often does not engage in meaningful consultation. Many viewed Canada's approach as largely a one-size-fits-all box-ticking exercise that fails to meaningfully address their concerns and relies too heavily on industry proponents and regulatory processes. Aboriginal groups also raised concerns with the content and implementation of existing guidance for federal officials and their own capacity to participate in consultation given their limited resources. Notably, their criticisms were not limited to the federal government. Many had equally negative or worse comments about the approaches taken by many provinces and territories in this area.

Industry participants acknowledged that they have an important role in consultation but felt that proponents are often asked to take on too much responsibility with too little direction from the federal government. They indicated that proponents are often "caught in the middle" on issues unrelated to their projects because Canada is missing in action. They find it challenging to work in an evolving legal landscape without clear guidance and they expressed frustration about the lack of coordination and consistency on consultation both within the federal government and with the provinces and territories. They told me that this lack of coordination and consistency results in duplication of effort, inconsistent requirements, and increased costs.

¹ I have attached a list of participants at Appendix A.

Federal officials generally felt that Canada had taken significant steps to improve its approach to consultation but many, particularly those who regularly consult with Aboriginal groups, felt there was still room for substantial improvement. They want consultation to be meaningful but need enhanced guidance, training, resources, and policy authorities to better equip them for this task. Some federal officials also struggle with how to meet the expectations of Aboriginal groups when they exceed what is required by case law or can practically be delivered.

Among the four provincial governments with whom I spoke, there was general consensus that intergovernmental coordination on consultation had improved in recent years but that greater information sharing, coordination, and alignment on key issues was still needed.

Notwithstanding these criticisms, it is important to acknowledge that Canada has made substantial efforts to improve its approach to consultation over the past decade through various measures including guidance documents, training, and enhanced oversight in the case of major projects. These measures, which are detailed in this report, have been helpful and there likely would have been far more issues with the federal government's approach had they not been introduced. However, Canada's overall approach still needs significant improvement to ensure more meaningful consultation. This requires concrete action in three overarching areas outlined below. A consolidated list of my recommendations can be found at Appendix B of this report.

SETTING THE FOUNDATION FOR MEANINGFUL CONSULTATION

There is no single recipe for meaningful consultation. However, the successful approaches of some industry proponents and government entities have certain common ingredients, such as bringing the right attitude and outlook to the table, a focus on building relationships and trust, and engaging as early as possible in the decision-making process.

The federal government needs to lead by example and place a greater focus on these key foundational elements of meaningful consultation. This will require it to first shift its mindset on and approach to the duty to consult. In particular, Canada needs to move from seeing consultation as primarily a legal obligation to manage or a process to document concerns to instead seeing it as a valuable tool and opportunity to improve its relationship with Aboriginal groups and advance reconciliation and other shared objectives. Consultation and accommodation is a means to an end, not an end in itself.

In addition, the federal government needs to focus on making broader improvements to its existing relationships with Aboriginal groups. The lack of positive relationships between many Aboriginal groups and many federal departments and agencies has been a barrier to consultation, particularly when combined with many longstanding unresolved Aboriginal grievances and disputes over the nature and scope of Aboriginal and treaty rights. This has often resulted in consultations becoming protracted or sidetracked by unrelated or broader issues because Aboriginal groups feel they lack other effective fora to address their concerns.

Some industry proponents have been very effective in building relationships with Aboriginal groups and are well ahead of the federal government in this area. Others have not had such success. Sometimes this occurs despite all reasonable efforts. In other cases, some proponents may have been able to avoid or minimize issues had they made greater efforts to build relationships at the outset and engaged Aboriginal groups earlier in the process.

To set the foundation for meaningful consultation, Canada should ensure that the overarching focus of any new guidance for federal officials and industry is on how to build or improve relationships with Aboriginal groups and how to use the duty to consult as a key tool and framework to support these efforts. There should also be a greater emphasis on engaging

Aboriginal groups as early as possible before key components of a project or a proposal are finalized and become difficult to change.

These changes will, however, require more than guidance. Federal departments and agencies need to prioritize and improve their relationships with Aboriginal groups through concrete measures that build trust, advance priorities of Aboriginal communities, and provide effective fora to address other long-standing concerns in a timely manner.

Aboriginal groups also have an important role to play. There are two sides to every relationship and reconciliation is not a one-way street. Success will require compromise and give-and-take on all sides and an understanding of each other's perspectives, interests, and respective challenges.

ENHANCING CAPACITY & REMOVING IMPEDIMENTS TO MEANINGFUL CONSULTATION

Canada also needs to take steps to enhance the capacity of Aboriginal groups, federal officials and industry proponents to engage in meaningful consultation and address other issues impeding this dialogue.

Many Aboriginal groups feel that they lack the resources and expertise needed to respond to consultation requests, particularly for resource development projects. This is a frequent early issue in consultation and industry proponents and federal officials often grapple with how to best to handle capacity funding requests from Aboriginal groups. Canada needs to do more to address this, including by reducing unnecessary capacity pressures, providing clearer guidance on capacity support and the reciprocal obligations of Aboriginal groups in making such requests, enhancing capacity funding, and encouraging the pooling of capacity resources where possible.

Action is also needed to address the capacity challenges that federal officials and some industry proponents face. Among other things, they need more guidance and training to better understand and adapt to the context in which they are undertaking consultation, including greater cultural awareness of the significant differences between and among First Nations, Inuit and the Métis and improved guidance and information regarding treaty rights and Aboriginal rights assertions. These differences cannot be ignored as meaningful consultation requires a nuanced rather than one-size-fits-all approach.

Enhanced guidance, training and policy authorities are also required to address other impediments to the perceived meaningfulness of consultation and ensure that it is not just a process to exchange information. This includes, but is not limited to, the scope and way in which potential impacts are assessed, when and what accommodation may be required, when consent is required, and how to ensure greater transparency in decision-making. Beyond guidance, Canada also needs to implement effective mechanisms to address issues outside of the mandates of any regulatory processes relied upon for consultation and accommodation.

CLARIFYING ROLES AND PROVIDING INCREASED OVERSIGHT

Finally, Canada needs to provide increased oversight and coordination across the federal government and greater clarity on industry's expected role in consultation and accommodation.

Canada needs to be more transparent about what it is delegating to or relying on industry proponents for and what the Crown remains responsible for. Federal departments and agencies also need to provide increased oversight of proponents and the consultation process and work with industry, provinces and territories to identify ways to improve coordination, reduce inconsistent approaches to key issues in consultation, and minimize duplication.

The need for oversight is not, however, limited to proponents. Across and within departments and agencies, guidance is not being consistently followed or implemented. Greater senior oversight within departments and agencies as well as central horizontal oversight is needed to ensure a truly whole-of-government approach to consultation and accommodation.

All of this work will require further dialogue with Aboriginal groups and where affected, industry, provinces and territories. It will take time but it is critical to get this right in order to ensure that consultation advances rather than hinders the hard and important work of reconciliation.

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I. INTRODUCTION

In May 2015, I was appointed as a Ministerial Special Representative to the then Minister of Aboriginal Affairs and Northern Development Canada on consultation and accommodation. I was asked to engage with Aboriginal groups and organizations, industry, federal departments, and provincial and territorial governments on how Canada could improve its approach to consultation and accommodation and to seek input on the following three documents:

- (i) the draft *Public Statement - Canada's Approach to Consultation and Accommodation* (the "Draft Public Statement");
- (ii) the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* released in March 2011 (the "2011 Guidelines"); and
- (iii) the draft *Consultation and Accommodation Advice for Proponents* (the "Draft Proponent Guidance").

These documents were all drafted by what is now Indigenous and Northern Affairs Canada ("INAC") and can be found at <http://www.aadnc-aandc.gc.ca/eng/1100100014680/>.

This report contains a summary of what I heard and my recommendations in response to the input that I received. In formulating these recommendations, I have considered the three engagement documents listed above, relevant jurisprudence, my experience in this area, and the consultation guidelines and policies issued by the provinces and some federal departments and agencies.

All views that I express in this report are my own and not those of my firm, McCarthy Tétrault LLP. Before outlining what I heard, I will provide some background on the duty to consult, Canada's current approach, and the three guidance documents.

Overview of the Duty to Consult

Prior to the patriation of the Constitution, the Aboriginal rights of First Nations, Métis and Inuit peoples were not constitutionally protected in Canada and could be extinguished by the Crown. This changed with the adoption of section 35 of the *Constitution Act, 1982* which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".²

Since then, the Supreme Court of Canada (the "SCC") has defined the scope of this promise in a series of decisions that set out a framework for the recognition of Aboriginal rights and title and the reconciliation of the interests and claims of Aboriginal and non-Aboriginal Canadians. The SCC has held that the "grand purpose" of section 35 is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."³ It has also defined the tests for Aboriginal rights⁴ and title⁵ while at the same time indicating that these rights are

² "Aboriginal peoples of Canada" is defined in s. 35(2) of the *Constitution Act, 1982* to include "Indian, Inuit and Métis peoples of Canada". *R. v. Sparrow*, [1990] S.C.J. No. 49 (SCC) at para. 53 ("*Sparrow*").

³ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53 (SCC) at para. 10 ("*Little Salmon/Carmacks*").

⁴ *Sparrow* at paras. 68-69; *R. v. Van der Peet*, [1996] S.C.J. No. 77 (SCC) at paras. 46-74 ("*Van der Peet*"), *R. v. Powley*, [2003] S.C.J. No. 43 (SCC) at paras. 14-46 ("*Powley*").

⁵ *Delgamuuk v. British Columbia*, [1997] S.C.J. No. 108 (SCC) at paras. 143-159 ("*Delgamuuk*"); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. 44 (SCC) at paras. 24-50 ("*Tsilhqot'in*").

not absolute and can be infringed by the Crown if certain requirements are met through the justification test.⁶

A key related legal development was the recognition of the Crown's duty to consult, and potentially accommodate Aboriginal peoples. In a series of decisions beginning in 2004, the SCC held that the Crown has a duty to consult whenever it has real or constructive knowledge of an asserted or established Aboriginal right or title and contemplates conduct or a decision that might adversely affect it.⁷

The duty to consult is a constitutional duty that is grounded in the honour of the Crown and is part of the reconciliation process.⁸ It applies to asserted but unproven rights as well as rights established through the courts or agreed to in treaties.⁹ The level of consultation required in a given situation is highly contextual and falls along a spectrum. It is proportionate to a preliminary assessment of the strength of the Aboriginal claim and the seriousness of the potential impact of the proposed government action on the asserted or established Aboriginal or treaty right at issue.¹⁰

Consultation may reveal a duty to accommodate, particularly in instances where there are established rights or a strong prima facie case for Aboriginal rights or title and the potential for significant impacts on these asserted or established rights. However, accommodation is not a stand-alone duty and is not required in all instances. Accommodation may entail taking steps to avoid irreparable harm, mitigating, or minimizing the effects of a government action or decision on the Aboriginal interests at stake.¹¹

Throughout the process, the Crown must act in good faith at all times and with the intention of substantially addressing the concerns raised.¹² Good faith is a key thread that binds both

“While the asserted but unproven Aboriginal rights and title are insufficiently specific for the Honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”

– *McLachlin C.J., Haida Nation v. British Columbia*, [2004] S.C.J. No. 70 (S.C.C.)

⁶ *Sparrow* at paras. 71-75; *Delgamuuk* at para. 160; *Tsilhqot'in* at paras. 77-88.

⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70 (SCC) at para. 35 (“*Haida*”); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69 (SCC) at para. 25 (“*Taku River*”); *Mikisew Cree First Nation v. Canada*, [2005] S.C.J. No. 71 (SCC) at paras. 33-34 & 55 (“*Mikisew Cree*”); and *Little Salmon/Carmacks* at para. 38. The duty to consult was previously recognized in other contexts but *Haida* and *Taku River* fundamentally altered the legal landscape in this area because the SCC recognized that the duty extends to asserted but not yet proven Aboriginal rights and title and it established the overall framework for consultation and accommodation. See, for example: *Sparrow* at para. 82; *R. v. Nikal*, [1996] S.C.J. No. 47 (SCC) at paras. 109-110; *R. v. Gladstone*, [1996] S.C.J. No. 79 (SCC) at paras. 55 & 64; and *Delgamuuk* at para. 168

⁸ *Haida* at para. 16-18 & 32. The honour of the Crown is a constitutional principle that arises “from the Crown’s assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people”. Its purpose is “the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty” and gives rise to different duties in different circumstances. It requires the Crown to act honourably in its dealings with Aboriginal peoples, although SCC clarified in *Manitoba Métis Federation* that not all interactions between Aboriginal peoples and the Crown engage the honour of the Crown. See also *Little Salmon/Carmacks* at para. 42-43; *Manitoba Métis Federation Inc. v. Canada*, [2013] S.C.J. No. 14 (SCC) at paras. 66-68.

⁹ *Mikisew Cree* at paras. 33-34 & 55; *Little Salmon/Carmacks* at paras. 61 & 67-69.

¹⁰ *Haida* at para. 39.

¹¹ *Haida* at paras. 46-48.

¹² *Haida* at para. 42.

consultation and accommodation. It requires the Crown to consult with an open mind and make genuine efforts to understand and address Aboriginal concerns before making a decision. Consultation is not intended to simply afford Aboriginal groups an opportunity to “blow off steam” before the government does what it intended to do all along.¹³

The Crown has significant flexibility in how it meets the duty to consult and it can rely on regulatory or environmental assessment processes to do so, where appropriate.¹⁴ The duty to consult ultimately rests with the Crown but it may delegate procedural aspects of the duty to industry proponents.¹⁵ Provinces and territories are responsible for meeting their own respective consultation obligations and there is no federal supervisory role, including for consultation obligations relating to historic treaties.¹⁶

The courts have repeatedly held that there is no duty to agree and that Aboriginal groups do not have a veto over land use pending the final resolution of a claim.¹⁷ Instead, the duty is a commitment to meaningful consultation with give and take on all sides. Consultation is not a one-way street; Aboriginal claimants have reciprocal obligations to participate in good faith and express any concerns that they have. They cannot frustrate reasonable good faith efforts by refusing to participate or meet or by imposing unreasonable conditions.¹⁸

If Aboriginal title has been established, the Crown must seek the consent of the title-holding group for developments on or use of the land. If consent is not provided, the Crown can only proceed if it has fulfilled its duty to consult and can justify its infringement on Aboriginal title.¹⁹

Over the last several years, many Aboriginal groups have taken the position that the Crown must obtain their free, prior and informed consent for any decisions affecting their asserted or established Aboriginal or treaty rights. This is based, in part, on certain provisions in the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). Canada initially voted against UNDRIP but later endorsed it on a qualified basis, expressing concerns about free, prior and informed consent (“FPIC”), among other things. Several court decisions have held that UNDRIP, including FPIC, is not legally binding in Canada and does not change Canada’s laws on the duty to consult.²⁰ The new federal and Alberta governments have since committed to implementing UNDRIP but it remains to be seen how the FPIC provisions will be interpreted and implemented by these governments and what impacts this will have on consultation and accommodation. This issue is more fully discussed in section 5 of this report.

The above section provides a high-level overview, rather than an exhaustive summary of the key principles of the duty to consult. A number of other relevant legal principles will be addressed in other sections of this report.

¹³ *Mikisew Cree* at para. 54.

¹⁴ *Taku River* at para. 40; *Brokenhead Ojibway Nation v. Canada*, [2009] F.C.J. No. 608 (FC) at para. 42. (“*Brokenhead*”)

¹⁵ *Haida* at para. 53.

¹⁶ *Grassy Narrows First Nation v. Ontario*, [2014] S.C.J. No. 48 (SCC) at para. 30 (“*Grassy Narrows*”).

¹⁷ *Haida* at para. 48; *Mikisew Cree* at para. 66; *Little Salmon/Carmacks* at para. 14, *Yellowknives Dene First Nation v. Canada*, [2015] F.C.J. No. 829 (FCA) at para. 56.

¹⁸ *Haida* at para. 42; *Halfway River First Nation v. British Columbia*, [1999] B.C.J. No. 1880 (CA) at para. 24 (“*Halfway River*”); *Long Plain First Nation v. Canada* [2015] F.C.J. No. 96 (FCA) at para. 158. (“*Long Plain*”)

¹⁹ *Tsilhqot’in* at paras. 80, 86-88.

²⁰ *Nunatukavut Community Council v. Canada*, [2015] F.C.J. No. 969 (FC) at paras. 103-4 (“*Nunatukavut*”); *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, [2013] F.C.J. 927 (FC) at para. 51; *Shuneymuxw First Nation v. Board of Education – School District #68*, [2014] B.C.J. No. 1343 (SC) at para. 59; *Gitxaala Nation v. Canada*, [2015] F.C.J. No. 289 (FCA) at para. 16.

Canada's Current Approach to Consultation and Accommodation

Canada consults with Aboriginal groups on a wide spectrum of activities such as environmental assessments and permitting for energy and mining projects, disposals of Crown land, overlapping interests related to land claims, species at risk, and the management of fisheries. Each department and agency is responsible for meeting any consultation obligations arising within its respective mandate. These consultations take place in a variety of fora including bilateral meetings with Aboriginal groups or representative aggregates, joint committees established through modern treaties, regional forums, and multi-stakeholder processes. In the case of resource development projects, Canada has to date generally integrated consultation into regulatory review processes rather than creating separate processes. This is known as Canada's "whole-of-government" approach to consultation and accommodation.

Over the past decade, the federal government has taken a number of steps to support federal officials in meeting Canada's consultation obligations.

First, the federal government has developed guidelines for its officials on when the duty to consult may arise and how it may be fulfilled. The first version was released in 2008 and an updated version was released in 2011. The 2011 Guidelines contain a set of Guiding Principles and Consultative Directives, guidance to departments and agencies on developing an overall approach to consultation, and step-by-step guidance for federal officials to design and implement a consultation process. Some departments and agencies have also developed additional mandate-specific guidance and tools on consultation and accommodation.²¹



Second, the federal government has provided non-mandatory training on the duty to consult to more than 3,550 federal officials across Canada since 2008²² and established other mechanisms to share relevant information, best practices and improve coordination on consultation. For example, in 2011, INAC created the Aboriginal and Treaty Rights Information System ("ATRIS") to provide a single point of access to information on established and asserted Aboriginal and treaty rights that might trigger the duty to consult. In addition, INAC chairs a Consultation and Accommodation Interdepartmental team of key regulatory and land holding departments and agencies that meets monthly to discuss legal updates and common challenges and share best practices. There are also regional networks of federal consultation practitioners that meet quarterly to do the same as well as several Regional Consultation Coordinators at INAC.²³

²¹ Examples of this include Environment and Climate Change Canada, the Canadian Environmental Assessment Agency, Transport Canada, the Canadian Nuclear Safety Commission, and Parks Canada.

²² These training sessions cover a wide range of consultation and accommodation issues and provide further guidance on common challenges and legal developments in this area. Between 2008 and 2012, this training was delivered in a one-day "Consultation 101" session. Since 2012, INAC has provided training in a more in-depth two-day "Consultation 201" session.

²³ Regional Consultation Coordinators ("RCCs") work to improve coordination amongst federal departments and agencies and with provinces and territories as well as negotiate consultation protocols, among other things. The coordination role of RCCs is largely internal but their ability to coordinate depends on their powers of persuasion as they do not have any authority over other departments. They do not interact significantly with Aboriginal communities, although there are some exceptions. The RCCs also have other non-consultation related responsibilities in their respective regional INAC offices.

In addition, the federal government has taken steps to increase oversight and coordination of Crown consultation for major resource development and infrastructure projects through the Major Projects Management Office (“MPMO”) and the Northern Projects Management Office (“NPMO”) for projects north of the 60th parallel. MPMO and NPMO were established in 2008 and 2010, respectively, to provide a single point of entry to and overarching management and coordination of the federal regulatory process for major projects. In addition to the offices themselves, there is a Deputy Ministers Committee and an Assistant Deputy Ministers Committee²⁴ that meet monthly to discuss issues arising from major projects and provide any needed direction, including on Aboriginal consultation and accommodation.

Third, the federal government has taken action to address specific challenges with Aboriginal consultation and engagement on major resource projects in the territories and the west. For example, Canada developed a Model of Consultation and Accommodation Practice in the Northwest Territories and the Yukon for environmental assessments and regulatory reviews with accompanying training and tools and has also worked to enhance the capacity of northern Aboriginal communities to participate in resource development through the Community Readiness Initiative.²⁵ In May 2014, Canada also established the Major Projects Management Office West in Vancouver to provide a single window for First Nations to engage with the federal government on issues relating to west coast energy infrastructure development.²⁶

Finally, given their significant role in this area, the federal government has also worked with the provinces and territories to improve information sharing and coordination on Aboriginal consultation and accommodation. This work has been done primarily through the federal/provincial/territorial working group on Aboriginal consultation and accommodation although the federal government has also been negotiating Memoranda of Understanding with provinces and territories to further improve coordination and information sharing.

Guidance Documents

As noted above, I was asked to seek input on three guidance documents which are further described below.

DRAFT PUBLIC STATEMENT

The Draft Public Statement is a new two-page high-level statement on Canada’s approach to consultation and accommodation, which was released for public comment in May 2015. It was drafted in response to a recommendation of Mr. Douglas Eyford, the former Special Federal Representative on West Coast Energy Infrastructure. In his 2013 report, Mr. Eyford recommended that Canada clarify its approach to the duty to consult, particularly the respective roles and responsibilities of industry and the federal government. This recommendation was in response to industry concerns about the lack of clarity in this area and, in some instances, frustration about the scope of responsibilities that proponents have been expected to assume.²⁷

²⁴ These Committees include Deputy Ministers, Assistant Deputy Ministers, or other senior representatives from INAC, Natural Resources Canada, Environment and Climate Change Canada, Fisheries and Oceans, the Department of Justice, the Canadian Environmental Assessment Agency, the Canadian Northern Economic Development Agency, the Canadian Nuclear Safety Commission, and the National Energy Board

²⁵ Canadian Northern Economic Development Agency, *Community Readiness*, <http://www.cannor.gc.ca/eng/1368817398699/1368817423354>

²⁶ See Major Projects Management Office – West, <https://mpmo.gc.ca/west/projects/216>

²⁷ Douglas R. Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*, November 2013, pp. 36-37, online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/ForgPart-Online-e.pdf>

2011 GUIDELINES

The 2011 Guidelines are Canada's overarching guidelines for federal officials on the duty to consult discussed above. I was asked to obtain feedback on the 2011 version because the then Aboriginal Affairs and Northern Development Canada intended to release a third version of the Guidelines in 2016 and wanted to obtain input from Aboriginal groups and other affected stakeholders before they did so.

DRAFT PROPONENT GUIDANCE

The Draft Proponent Guidance is a new 6-page document drafted in response to calls from both industry and Aboriginal groups for governments to provide greater guidance to industry proponents on consultation and accommodation given their significant involvement in this area.²⁸ The document was released for comment in May 2015 and indicates that it could become part of the next Updated Guidelines for Federal Officials and thus was not necessarily drafted as a stand-alone document.

Overview of What I Heard

I heard a fairly wide range of views about Canada's approach to consultation and accommodation in this engagement. At one end of the spectrum, some Aboriginal participants said that Canada's approach has been a dismal failure. In their view, Canada's approach has been dysfunctional, has failed to respect Aboriginal rights and title and account for indigenous legal orders and governance, and is out of step with Canada's domestic and international legal obligations. These comments were not only based on Canada's actions but also its perceived inaction or absence, with some participants suggesting that Canada had effectively abdicated the field on consultation either to the provinces or proponents, or both.

Further along the spectrum, many Aboriginal groups suggested that Canada has been taking a minimalist, one-size-fits-all approach that is focused on managing legal obligations and risk rather than on relationship building and achieving reconciliation. They see the 2011 Guidelines as articulating a shallow view of reconciliation and feel that Canada has attempted to minimize its responsibilities through a papered consultation process aimed at ticking boxes rather than meaningfully consulting. Many Aboriginal groups also stated that Canada has routinely imposed consultation processes that fail to incorporate Aboriginal perspectives or recognize and accommodate the uniqueness of Aboriginal groups and key historic, regional, legal, and governance differences among them.

A small number of Aboriginal groups were less critical of the content of the 2011 Guidelines but felt that the key failure has been in implementation, particularly outside of major projects. Industry participants also raised significant implementation concerns with the federal government's overall approach to consultation, particularly the lack of coordination and inconsistent approaches within the federal government and with the provincial and territorial governments. They also expressed frustration about the lack of clarity about the respective roles and responsibilities of the Crown and industry and the extent to which the federal government relies on proponents to fulfill consultation requirements.

²⁸ Some federal departments and agencies have issued additional guidance to proponents, such as the Canadian Nuclear Safety Commission in REGDOC-3.2.2 *Aboriginal Engagement*, online: http://www.nuclearsafety.gc.ca/pubs_catalogue/uploads/REGDOC-3-2-2-Aboriginal-Engagement-eng.pdf and the National Energy Board in its *Filing Manual*, 2015, online: <https://www.neb-one.gc.ca/bts/ctrq/qnnb/flngmnl/flngmnl-eng.pdf>.

In addition to implementation concerns, industry participants said that they lacked the practical guidance needed to address issues on the ground. They feel that the absence of clear guidance on what is required, insufficient federal oversight, and the lack of timely decision-making in certain instances is contributing to significant uncertainty for resource development and investment in Canada. They also expressed concerns about consultations becoming protracted by unrelated issues due to the lack of other effective processes for Aboriginal groups to advance these issues with the federal government.

Many federal officials also raised concerns with the sufficiency of current guidance. They felt that the 2011 Guidelines are too high-level and do not provide enough direction, particularly on accommodation and for Crown decisions outside of major projects. A small minority of participants suggested that the 2011 Guidelines were good but simply needed to be updated to account for developments in the case law such as the SCC's *Tsilhqot'in* decision on Aboriginal title.

Notwithstanding these criticisms, some participants acknowledged that Canada has made progress in certain areas and spoke positively of a couple of federal agencies. In particular, many Aboriginal groups said that Parks Canada was an example of a respectful and collaborative partner that listens to and works well with Aboriginal groups. The Canadian Environmental Assessment Agency ("CEAA") was also singled out by several Aboriginal groups as a federal entity that engages in meaningful consultation in the context of comprehensive study environmental assessments, although it was also the subject of substantial criticism on several issues.

In addition to these positive comments, it should be noted that the courts have found that Canada has met the duty to consult more often than not when they have been asked to make a ruling on this issue. These decisions demonstrate that there is in some cases a gap between what Aboriginal groups expect regarding consultation and accommodation and what the law requires. However, it does not negate or undermine all of the criticisms of Canada's approach. Many federal government decisions are not challenged for a variety of reasons and these win-lose decisions do not deal with the broader relationship issues at stake and the significant costs they impose. Victories in court are also a flawed measure for success; all parties concerned would rather keep consultation out of the courts in the first place. More meaningful consultation by the federal government is needed to make that possible.

This report contains 6 sections. Section 2 addresses the need for the federal government to set the foundation for meaningful consultation. Sections 3 to 6 address specific issues regarding consultation and accommodation that were raised in the engagement along with my recommendations on how to address them.

II. SETTING THE FOUNDATION FOR MEANINGFUL CONSULTATION

Building Relationships and Reframing Canada's Approach

In this engagement, many Aboriginal groups and some industry proponents felt that the federal government was not sufficiently focused on building relationships and advancing reconciliation with Aboriginal peoples. Many Aboriginal groups felt that the federal government only shows up when it wants something and then fails to follow-up on issues that are important to their communities. Industry proponents also reported hearing frequent complaints from Aboriginal groups that federal officials do not visit their communities or address their concerns.

The federal government's historically fractious relationship with Aboriginal groups has been a major impediment to successful consultation on federal decision-making. The significant mistrust that Aboriginal groups have of the federal government often leads them to be suspicious of Canada's motives and doubt the accuracy of the information provided to them. In addition, because of the lack of other effective fora to resolve long-standing concerns in a timely way, consultation is often used by Aboriginal groups to raise a broad range of potentially unrelated issues while they have Ottawa's attention. This can unnecessarily broaden the scope of consultation discussions and impede the resolution of issues relevant to the decision at hand.



These criticisms do not apply equally across the board. As noted previously, Aboriginal groups spoke highly of Parks Canada and its approach to relationship building and engagement in recent years. Parks Canada's approach is not without issues nor has it always been a leader in this area.²⁹ It has had to rebuild trust and relationships with Aboriginal groups in the shadow of significant historic grievances including the forcible removal of Aboriginal peoples from their land and the prohibition of traditional practices on lands that became park lands. However, over the last 15 years, Parks Canada has prioritized and invested in engagement and relationship building with Aboriginal peoples and now works with over 300 Aboriginal communities across Canada and manages over 65 per cent of the lands through formal or informal relationships with one or more Aboriginal partners.³⁰

I realize that the experience of Parks Canada is somewhat distinctive in the federal government given its mandate for environmental stewardship and its level of interaction with Aboriginal groups. That said, valuable lessons can still be drawn from some of its successes and the experience of others that have built positive relationships with Aboriginal groups.

²⁹ A couple of participants raised concerns with the insufficiency of consultation by Parks Canada for the creation of additional park lands. The failure of Parks Canada to consult with an Aboriginal group was also the subject of the first SCC case that considered whether Canada had met the duty to consult - see *Mikisew Cree*.

³⁰ Parks Canada, *Promising Pathways – Strengthening Engagement and Relationships with Aboriginal peoples in Parks Canada Heritage Places*, 2014 ("*Promising Pathways*"); Parks Canada, *The Land is Our Teacher – Reflections and Stories on Working with Aboriginal Knowledge Holders to Manage Parks Canada's Heritage Places*, 2015, p. 1.

If Canada wants to improve its approach to consultation, federal departments and agencies need to place a greater focus on building better relationships with Aboriginal groups. Consultation cannot be divorced from the overall relationship. As a result, any efforts to improve the federal government’s current approach to consultation will not fully address the issues impeding consultation without broader changes to the relationship. The need for a greater focus on relationship building with Aboriginal groups is required in any event to implement the direction that Prime Minister Justin Trudeau provided to all Cabinet Ministers:

“I made a personal commitment to bring new leadership and a new tone to Ottawa. We made a commitment to Canadians to pursue our goals with a renewed sense of collaboration. Improved partnerships with provincial, territorial, and municipal governments are essential to deliver the real, positive change that we promised Canadians. No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.” (emphasis added)

This renewed relationship is badly needed and long overdue. But it will not happen by accident or through words alone. Federal officials need guidance, resources, and oversight to ensure that this does not become yet another unfulfilled promise to Aboriginal peoples.

There are several new approaches that could help federal officials and industry focus more on relationship building and thereby establish this key ingredient for meaningful consultation.

First, Canada should reframe all three guidance documents so that the overarching focus is on building strong relationships with Aboriginal groups and advancing reconciliation, with the duty to consult being an important tool and framework for this work. This requires a shift in mindset and attitude – to see the duty to consult as an opportunity to build better relationships and advance shared objectives and not simply a cost or legal obligation to manage. To support this shift, Canada needs to articulate in any new guidance that building strong relationships with Aboriginal groups and advancing reconciliation is a priority and explain the range of benefits for doing so.

“For industry, companies that do not strive to build healthy relationships with Aboriginal communities do so at their peril,”

– Pierre Gratton, President of the Mining Association of

The federal government also needs to provide guidance and training to federal officials and industry on how to go about building and maintaining relationships with Aboriginal groups, particularly in the early stages of project development or government decision-making. Canada should look to successful approaches both in government and industry and extract key principles and best practices in consultation with Aboriginal groups. There are also some existing guidance documents that Canada can draw on for ideas. For example, Parks Canada articulated its approach well in a 2014 resource guide titled *Promising Pathways: Strengthening Engagement and Relationships with Aboriginal peoples in Parks Canada Heritage Places*.³¹

³¹ I have reviewed many guidance documents across the country for this engagement and this one distinguishes itself in its practicality and message, including, among other things, providing helpful “lessons from the field” of Parks Canada employees, examples of specific successful relationship-building initiatives, as well as a message from the former CEO which makes it clear that it is an organizational priority.

Other jurisdictions like British Columbia have also begun to provide guidance on relationship building for proponents, which Canada could consider.³²

Second, Canada needs to ensure that federal officials have a better understanding of the framework within which they are building relationships. This requires a more comprehensive understanding of the complexities of the Crown's relationship with Aboriginal peoples, the nature and scope of Aboriginal and treaty rights, and greater cultural awareness and appreciation of the significant differences between First Nations, Métis and Inuit peoples. This will be addressed in Section 3 of this report.

Third, as the duty to consult is part of the larger reconciliation project, the federal government should also articulate how the duty to consult fits into and can be used to advance reconciliation. This requires not only acknowledging the long history of the Crown making decisions without consultation that adversely affected Aboriginal interests but also developing a better understanding of the concept of reconciliation and a shared vision for achieving it. In its 2015 report, the Truth and Reconciliation Commission noted that "the concept of reconciliation means different things to different people, communities, institutions and organizations." Reconciliation cannot be advanced without a shared understanding of its purpose and objectives. Without this, it risks being a word used by passengers aboard two ships passing in the night.³³

Fourth, to ensure that relationship-building and reconciliation are prioritized, federal departments and agencies should be required to set their own concrete objectives designed to improve relations and advance reconciliation with Aboriginal groups backed by performance measures. As noted by Alain Latourelle, the former CEO of Parks Canada, "unless you make it an organizational wide priority, put it on performance assessments and put in support you are not going to have success".³⁴

Parks Canada has 5 key Aboriginal relations priorities: (i) building meaningful relationships with Aboriginal peoples (ii) creating economic partnerships (iii) increasing Aboriginal programming at parks/sites (iv) enhancing employment opportunities and (v) commemorating Aboriginal themes.³⁵ Federal departments and agencies should work with Aboriginal groups to identify key

"...what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

– Lamer C.J., *R. v. Van der Peet*, [1996] S.C.J. No. 77 (S.C.C.)

³² See British Columbia, *Building Relationships with First Nations – Respecting Rights and Doing Good Business*, online: http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/building_relationships_with_first_nations_english.pdf

³³ The 2011 Guidelines state that "reconciliation has two main objectives: 1) the reconciliation between the Crown and Aboriginal peoples and; 2) the reconciliation by the Crown of Aboriginal and other societal interests". This does not explain what is exactly being reconciled. It also does not explain that it is not just about redress for historic grievances but also about reconciling "the prior occupation of North American by distinctive Aboriginal societies with the assertion of Crown sovereignty over Canadian territory". In *Delgamuuk*, then Chief Justice Lamer held s. 35(1) must recognize and affirm two aspects of this prior presence (i) the occupation of the land and (ii) the prior social organization and distinctive cultures of aboriginal peoples on that land. (see paras. 81 & 141)

³⁴ *Promising Pathways*, p. 4.

³⁵ *Promising Pathways*, p. 4.

priorities that can help to improve their own relationships, advance common interests and resolve long-standing concerns. Future engagements about implementing the recommendations in the Truth and Reconciliation Commission Report may identify some of the priorities on which to focus. This should be done in collaboration with other departments and agencies to ensure coordination of objectives and approaches.

Fifth, federal officials need to be prepared to raise concerns with the approaches of other departments and agencies if they are falling down on consultation and accommodation and undermining Canada's relationship with Aboriginal peoples. If Canada wants to have a nation-to-nation relationship, then federal departments and agencies need to act as a unified Crown and not just a number of different departments and agencies solely focused on their own individual mandates without considering how the approaches of other Crown representatives could impact the broader relationship. It also requires acknowledging that Canada's relationship with Aboriginal peoples is not just the responsibility of Indigenous and Northern Affairs Canada – it is the responsibility of every single federal department and agency. This point is effectively underscored by the above direction from the Prime Minister to all Cabinet Ministers. This needs to be supported through central oversight which will be discussed later in this report.

Finally, relationship building and improved consultation processes will also require greater action to resolve or narrow the many areas of disagreement on the nature and scope of Aboriginal and treaty rights. This has been a failure of many successive governments. It continues to undermine the relationship between Aboriginal groups and the federal, provincial, and territorial governments and has had significant costs for the Canadian economy. A new comprehensive framework is needed to ensure that Aboriginal and treaty rights are appropriately recognized and respected and to bring greater certainty for all parties. This requires more effective implementation of treaties and improved policies to expeditiously reach negotiated agreements with Aboriginal groups on the nature and scope of unresolved asserted Aboriginal rights and title and disputes over treaty rights, where possible.³⁶

Work to develop a new framework for Aboriginal and treaty rights was commenced by the previous federal government, including through an engagement by Ministerial Special Representative Douglas Eyford on the development of a new comprehensive claims policy,³⁷ the engagement by Ministerial Special Representative Thomas Isaac to map out a process for dialogue on Section 35 Métis Rights³⁸, and the adoption of a Cabinet Directive on the Federal Approach to Modern Treaty Implementation.³⁹ This new framework is badly needed to support the task of reconciliation and this important work should continue in earnest.

³⁶ It currently can take up to 30 years to negotiate a comprehensive land claims agreement and the average negotiating time is 15 years. See Douglas Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights", April 2015, online: <http://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218>

³⁷ Douglas Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights", April 2015, online: <http://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218>

³⁸ Indigenous and Northern Affairs Canada, *Engagement with Métis*, online: <https://www.aadnc-aandc.gc.ca/eng/1433442735272/1433442757318>

³⁹ Indigenous and Northern Affairs Canada, *Cabinet Directive on the Federal Approach to Modern Treaty Implementation*, online: <https://www.aadnc-aandc.gc.ca/eng/1436450503766/1436450578774>

Relationship building will take time and short-cuts can result in set-backs. It requires picking up the phone and more face-to-face meetings to understand concerns and avoid the erroneous assumptions that can arise on both sides from not talking. It also requires a willingness of the federal government to be bolder and think outside of the box. As one participant noted, Canada should be more willing to dip its toes in the water to try more experiments and pilot projects as some provinces have done. Regional rather than national approaches on issues will also likely yield more success as consensus is easier to build incrementally and the approaches can be better tailored to take into account the significant differences between Aboriginal groups across the country. Some of these efforts may fail but there will be lessons learned that can help to find a more successful approach the next time. This is an area of incremental change but it is the small steps that move things forward. Neither the enormity of the task nor the fear of precedent should be used as an excuse to paralyze progress.

“There is no simple formula to building a strong relationships with local Aboriginal groups. Relationships are by nature complex and personal, which makes them difficult to define and even more difficult to reproduce. However, there are a number of common elements that exist in every strong relationship, although they may be found in varying degrees – mutual trust, respect and understanding.”

– Parks Canada, Promising Pathways

Aboriginal groups also have an important role to play in this and their approach will be critical to the success of starting a new chapter. The SCC has made it clear that reconciliation requires compromise and give-and-take on both sides. The many issues in this area are complex and involve multiple interests that the federal government must appropriately balance. These issues cannot be resolved overnight nor should change wait for the perfect solution, which can unduly delay progress and meaningful improvement in the interim. Aboriginal groups need to come to the table with constructive approaches and a willingness to find a middle ground where possible in order to advance shared objectives.

RECOMMENDATIONS

1. **Canada should reframe any new guidance documents on the duty to consult to have an overarching focus on how to build strong relationships with Aboriginal groups and advance reconciliation, with the duty to consult as an important tool and framework for this work. Canada should also provide guidance on what reconciliation means, why it is important, and how the duty to consult can assist with advancing it.**
2. **All federal departments and agencies should work with Aboriginal groups to identify key Aboriginal concerns within their respective mandates and set specific key priorities for improving the relationship with Aboriginal groups and advancing reconciliation, supported by training, performance measures, and appropriate oversight.**
3. **In order to facilitate and support future consultation, Canada should continue to work with Aboriginal groups, provinces, territories and affected third parties to develop a new framework for Aboriginal and treaty rights that will more expeditiously reach negotiated settlements of Aboriginal rights and title claims where possible and resolve disputes over the interpretation and implementation of treaties.**

Promoting Early Engagement

Early engagement is frequently singled out by both Aboriginal groups and industry as a key ingredient of meaningful consultation. The term “engagement” is used rather than “consultation” because it frequently occurs before the duty to consult is formally triggered.

For industry proponents, engaging as early as possible can provide more opportunities to develop plans that avoid or minimize impacts on key Aboriginal interests before significant investments are made and project adjustments become more difficult. This is important to the perceived meaningfulness of consultation even though it may begin before consultation is legally required. If done properly, early engagement can be a key tool in building trust and starting a relationship out on the right footing.

Both Aboriginal groups and industry indicated that the guidance documents need to put a greater emphasis on early engagement and explain how best to go about it. Current federal guidance on this issue is limited. Guiding Principles #2 and #3 in the 2011 Guidelines highlight the importance of initiating consultations early in the planning, design or decision making process but do not provide clear guidance on exactly when and how this should be done. The Draft Proponent Guidance is even more limited on this issue and simply states that industry proponents should ensure that “consultation with Aboriginal groups occurs early and throughout the project”.



This guidance is insufficient. Early engagement is important and can have significant impacts on the consultation process if it is not done or not done properly. This current guidance leaves several unanswered questions, including what does “early” mean in specific contexts like a mining project or a policy change and what is the best way to approach these discussions? In the resource development context, for example, it is often suggested that “early” means engaging prior to filing a project description. However, there are differing views and approaches about how far in advance of finalizing a project description this should be done and how best to initiate such discussions, including the degree to which senior leadership of a company should be involved. Aboriginal groups expect to be engaged well before the key components of the project are decided (e.g. the location of a tailings pond) or at the early stages of policy development or other government decisions that could impact asserted or established rights (e.g. the creation of protected areas, the selection of treaty lands or additions to reserve lands where there are overlapping interests etc.). They also want discussions with industry proponents to be initiated by the senior leadership of the company. There is currently a lack of consistency among industry and the federal government on early engagement and greater guidance is required based on best practices of industry and any lessons learned from various federal government early engagement initiatives.

RECOMMENDATIONS

4. **Canada should, in consultation with Aboriginal groups and industry, develop best practices for “early engagement” in specific contexts (i.e. particular types of resource development projects, policy development and fisheries, wildlife and land management decisions etc.) and provide more detailed guidance to federal officials and industry on the timing and purpose of early engagement.**

III. ENSURING MEANINGFUL CONSULTATION

Almost every Aboriginal group that I met with or received submissions from raised concerns relating to the meaningfulness of consultation. Canadian courts have repeatedly underscored the need for consultation to be meaningful. As stated in a recent decision of the BC Court of Appeal:

“There must be more than an available process; the process must be meaningful. In this regard, I agree with the views of Neilson J. in *Wii'litswx # 1* at para. 178: ‘The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information’. That obligation was described by Finch J.A. (as he then was) in *Halfway River* at para. 160 as ‘a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action’.”⁴⁰ (emphasis added)

The 2011 Guidelines state that “...a meaningful consultation process is one which is:

- Carried out in a timely, efficient and responsive manner;
- Transparent and predictable;
- Accessible, reasonable, flexible and fair;
- Founded in the principles of good faith, respect and reciprocal responsibility;
- Respectful of the uniqueness of First Nation, Métis and Inuit communities; and
- Includes accommodation (e.g. changing of timelines, project parameters), where appropriate.”

Some Aboriginal groups felt that certain key elements were missing from the above definition and wanted to see these criteria expanded to include the requirements to: (i) provide capacity assistance (ii) consider impacts on an incremental and cumulative basis and (iii) substantially address Aboriginal concerns. However, the majority of the concerns were about the implementation of the above principles in the 2011 Guidelines and some of the underlying guidance or lack thereof, rather than the principles themselves. Federal officials and industry proponents also raised concerns about the level of practical guidance or training (in the case of federal officials) on a number of issues in this area. Beyond guidance, some federal officials indicated that time and resource restraints have also hindered their ability to review, consider and respond in a meaningful way to the various issues Aboriginal groups raise in consultations, particularly within the statutory timelines for environmental assessments.

This section will address a broad range of issues relating to the meaningfulness of consultation, with the exception of Aboriginal capacity which will be addressed in a separate section given the number of issues that it raises.

Understanding and Adapting Consultation to the Context

One of the frequent criticisms of the federal government’s approach to consultation is that it is not respectful of the important differences between Aboriginal groups. By way of background, there are over 617 *Indian Act* bands, 53 Inuit communities in four regions, six provincial and territorial Métis organizations, and numerous Métis local councils in Canada. There are significant cultural and historic differences between these groups and the nature and scope of

⁴⁰ *Chartrand v. British Columbia*, [2015] BCCA 345 (CA) at para. 77.

their asserted or established rights vary considerably. There is also substantial variation in the capacity of Aboriginal groups to respond and participate effectively in consultation processes. These differences require significant nuance in the federal government's approach, which is currently lacking. In particular, there is a need for greater guidance, training and information sharing for federal officials and industry on (i) general cultural awareness and understanding the differences between and among First Nations, Inuit and Métis (ii) the nature and scope of Aboriginal rights and title assertions and (iii) treaty rights. I will address each in turn.

CULTURAL AWARENESS AND DIFFERENCES BETWEEN ABORIGINAL GROUPS

Many Aboriginal groups were concerned with the lack of cultural awareness demonstrated by some federal officials and industry proponents. One Aboriginal organization noted that Canada invests substantial resources to ensure its diplomatic representatives understand the history, cultural values and traditions of the country to which they will be posted but does not do the same for federal officials engaged in consultation with Aboriginal groups.

Cultural awareness and understanding the history and socio-economic situation of communities and their decision-making structures are an important part of building positive relationships and conducting respectful and meaningful consultations. Federal officials need greater training in this area and it should be shaped and led by Aboriginal groups on a nation and/or treaty basis, to the extent possible (e.g. the Coast Salish, the Mic'maq, Treaty 3 etc. rather than individual *Indian Act* bands to the extent that they are part of a larger nation). Some industry proponents could also benefit from opportunities to partner on such training.

In addition, greater guidance is needed on consultation with the Métis and Inuit. The 2011 Guidelines and the Draft Proponent Guidance do not contain any Inuit or Métis specific guidance and there is significantly less awareness within the federal government on Inuit and Métis issues in comparison to First Nations. This is particularly problematic for the Métis because there are modern treaties in place in all four Inuit regions which delineate the nature and scope of Inuit rights and, in some cases, provide some direction on consultation.

There are several challenges that arise in consultation with the Métis, including differing positions taken by the federal government and certain provinces on whether the Métis can credibly claim s. 35 rights in certain areas as well as opposition from some neighbouring First Nations to Métis claims. However, one of the biggest issues for both federal officials and industry is the lack of clarity on who is the rights bearing Métis community that should be consulted in a given situation (e.g. the Métis Local Council or the provincial Métis organization). Several provincial Métis organizations take the position that they have been mandated to represent the collective interests of the Métis in their region and should be contacted first to determine how consultation will unfold.⁴¹ However, consultation sometimes only takes place with Métis local councils because, among other things, these local councils take the position that the provincial organizations do not represent them. There are also concerns that some provincial Métis organizations have not properly enforced the *Powley* criteria and have members that do not meet the definition of Métis set out by the SCC for s. 35 rights.⁴²

⁴¹ There is some case law which suggests that at least some historic rights bearing Métis communities should be defined on a regional rather than local basis. See *R. v. Hirsekorn*, [2013] A.J. No. 697 (CA) at para. 63.

⁴² In *Powley*, the SCC held that "The term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears." The SCC set out three broad factors as indicia of Métis identity for the purposes of claiming Métis rights under s. 35: (i) self-identification as a member of a Métis community (ii) present evidence of an ancestral connection to an historic Métis community (iii) acceptance by the modern community whose continuity with the

Determining who speaks for asserted or established rights-holders is a fundamental issue and this needs to be resolved on a priority basis. Fortunately, there is an existing example to draw upon. In July 2015, the former Minister of Aboriginal and Northern Affairs signed a Consultation Agreement with the Métis Nation of Ontario (“MNO”) which provides a single-window process through which Canada can consult the MNO’s 29 Community Councils. This agreement is the first of its kind to be reached with a Métis group in Canada and should be replicated where possible and appropriate. It not only brings certainty and needed direction as to whom to consult, but also simplifies the process and enhances capacity through a pooling of resources.

RECOMMENDATIONS

5. **Canada should ensure that federal officials involved in consultation participate in general and nation specific Aboriginal awareness training that is shaped and delivered by Aboriginal communities.**
6. **Canada should provide greater guidance and training on the Métis and Inuit, which explains who they are, how their asserted or established rights may differ from First Nations, key jurisprudence, and any other special considerations to be taken into account when consulting the Métis and Inuit.**
7. **Where possible, Canada should attempt to negotiate consultation MOUs with other provincial/territorial Métis organizations to provide single windows for Métis consultation in Manitoba, Saskatchewan, Alberta, British Columbia, and the Northwest Territories. Where this is not possible, Canada should identify and provide direction to federal officials and industry on the appropriate rights-holders to consult with for asserted or established Métis claims.**

ASSERTED RIGHTS

Beyond general cultural awareness, more meaningful consultation (and relationship building) will require a better understanding of the nature and scope of Aboriginal rights and title assertions in Canada. Many federal officials and a number of Aboriginal groups raised concerns with the level of guidance, training, and information-sharing in this area.

Unfortunately, none of the guidance documents sufficiently explain the potential scope and content of Aboriginal rights and title and the tests used to establish them. The lack of guidance can create issues in consultation because, in practice, there appears to be a propensity by at least some federal officials and industry proponents to focus only or largely on hunting, fishing and gathering when considering impacts to Aboriginal rights. Aboriginal rights case law has developed primarily in the context of prosecutions for hunting and fishing but this does not mean that Aboriginal rights are limited to these practices. Aboriginal rights are elements of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group.⁴³ Hunting, fishing and gathering may be part of the particular group’s distinctive culture but these practices are not the sum total of what makes these groups distinct. Other potential rights relating to historical cultural and spiritual practices need to be better explained so that potential impacts can be

historic community provides the legal foundation for the right being claimed. The SCC recently held in *Daniels v. Canada*, [2016] S.C.J. No. 12 (SCC) that the definition of Métis in the context of s. 91(24) of the *Constitution Act, 1867* was not restricted to the *Powley* criteria but it did not alter the definition of Métis for the purposes of s. 35, which is the relevant definition for the duty to consult.

⁴³ *Van der Peet* at para. 46.

properly assessed. The guidance on Aboriginal title also needs to be updated in light of the *Tsilhqot'in* decision.

In addition, Canada needs to ensure that federal officials and industry can easily inform themselves of any relevant Aboriginal rights assertions that may be impacted by a particular decision. INAC has taken steps to address this through ATRIS, which is intended to provide a single point of access to information in this area. This system is publicly accessible but some information is restricted to federal officials.



ATRIS is a substantial undertaking and work in progress but it currently has significant deficiencies that need to be addressed. Several Aboriginal groups complained that ATRIS contained inaccurate and incomplete information and they were concerned that federal officials and industry proponents might be relying on it. Many federal officials thought ATRIS was helpful but did not yet contain all of the information they required. The federal government receives significant information on asserted Aboriginal rights, current and historic land-use, and fisheries activities through regulatory processes, comprehensive claims, specific claims and litigation, but only a fraction of this information is added to ATRIS. Some is in the process of being added but much of it has been filed away by different departments and agencies, which can result in unnecessary duplication of effort by both federal officials and Aboriginal groups.

Many federal officials expressed particular frustration that they do not have access to existing strength of claim assessments held by other departments. There is currently no central repository for existing federal strength of claim assessments and federal officials indicated that other departments and sometimes even sectors within their own departments are reluctant to share existing assessments due to concerns relating to confidentiality and maintaining privilege. This is problematic because (i) federal officials are having to reinvent the wheel on strength of claim and (ii) there is relevant historical research relied upon that is not being made available to federal officials conducting consultation. Internal privilege and confidentiality concerns, even if legitimate, do not impact the Crown's constructive knowledge. The Crown is indivisible and there needs to be a way to ensure that the existence of these materials is known and that any internal privilege and confidentiality concerns are resolved, such as by having a specialized government-wide team devoted to or overseeing strength of claim for consultation.

Canada can do a much better job at encouraging and facilitating information sharing on asserted rights both within the federal government and with the provinces and territories, which in many cases have more extensive site-specific information on traditional and current land-use.⁴⁴ However, in order to do so, additional resources are needed for federal officials to analyze a vast quantity of information and reduce it to the essential elements required for consultation which can then be added to ATRIS. Federal officials also need to be required to provide any new relevant information they obtain on Aboriginal rights assertions (e.g. new traditional land-use information, new maps, modifications to rights assertions) to INAC's Consultation Information Service on an ongoing basis. ATRIS relies on other departments and

⁴⁴ Canada does have a Memorandum of Understanding with British Columbia on information sharing. This has resulted in the sharing of provincial geospatial and ethnohistorical data, which has provided additional helpful information to federal officials for identifying and assessing Aboriginal interests that may be relevant for consultation on federal decision-making in BC.

agencies to share this information, which does not currently happen on a consistent basis. Sometimes this is due to confidentiality issues or concerns that the department does not have the consent of Aboriginal groups to share the information. These issues need to be worked through and, at a minimum, the existence of any such information should be identified in ATRIS with contact information so that federal officials can get more details and work through any confidentiality issues where necessary.

Aboriginal groups should also be provided with an opportunity to comment on any non-privileged information about their asserted or established Aboriginal or treaty rights and provide any additional existing relevant information. There will undoubtedly be differing positions on both asserted and established rights but this is relevant information to know.⁴⁵

RECOMMENDATIONS

8. **Canada should provide more comprehensive guidance to federal officials and industry on the potential scope, content, and tests to establish Aboriginal rights and title and work with Aboriginal groups, provincial, and territorial governments to enhance the Aboriginal and Treaty Rights Information System (“ATRIS”). This work should ensure that ATRIS includes all current land and marine based rights assertions, current land use and summaries of all available traditional land use studies, historic and current fishing practices, a list of any existing strength of claim assessments (for federal officials only), and up to date information on the status of and federal positions on any related Aboriginal rights and title litigation.**

HISTORIC AND MODERN TREATIES

There are approximately 70 recognized historic treaties and 26 modern treaties in Canada. These treaties cover much of the country’s land mass but differ significantly in their length, terms, and original purpose. Historic treaties, which were entered into prior to 1975, are generally quite short and recognize rights such as hunting, fishing, trapping, and trade for a moderate livelihood, among other things. Some of these treaties include land surrender provisions while others do not.⁴⁶ Modern treaties are much more detailed agreements and confer a broader range of rights and benefits from harvesting rights to subsurface rights, self-government provisions, fee simple ownership of specific lands, and significant capital transfers.

The duty to consult applies to both historic and modern treaty rights and many modern treaties include specific consultation provisions. In the case of the latter, the scope of the duty to consult is shaped by these provisions but they do not form a “complete code” on consultation. There may be a duty to consult separate and apart from any consultation obligations in the treaty if the issue has not been specifically addressed in the treaty.⁴⁷

⁴⁵ Tracking and recording these positions does not mean that the federal government is endorsing them. Rather, it ensures that federal officials engaging in consultation are aware of any relevant Aboriginal positions. Where there are differing views, this can easily be flagged in ATRIS.

⁴⁶ Even in historic treaties where there are land surrender provisions, some Aboriginal groups dispute the validity of extinguishment or assert that the language of the treaties does not reflect the actual oral agreement of the parties at the time of signing.

⁴⁷ *Little Salmon/Carmacks First Nation* at paras. 61-62 & 67.

In this engagement, Aboriginal groups with treaties felt that the 2011 Guidelines and some federal officials appear to approach consultation largely through the lens of asserted rights and unfairly treat established and asserted rights similarly. They indicated that they would like to see more guidance and training on treaty rights and consultation in both the historic and modern treaty contexts. Some First Nations with modern treaties expressed frustration that they have to spend a great deal of time debunking myths, and explaining the content of treaties and how consultation is different under modern treaties as a result of this lack of guidance.⁴⁸ Some of these concerns relate to broader challenges with treaty implementation. To this end, several Aboriginal groups with modern treaties welcomed the announcement by former Minister Valcourt in July 2015 aimed at improving Canada's implementation of modern treaties, including through the adoption of a Cabinet Directive and the establishment of a Deputy Ministers' Oversight Committee and a Modern Treaty Implementation Office.⁴⁹



Despite this recent positive development, Canada can and should do more by making it simpler for federal officials and industry to determine and understand what relevant treaty rights exist, the geographic scope of these rights, the location of any treaty lands or outstanding treaty land entitlements, and what if any consultation obligations exist under the treaty. This is important and necessary work as consultation based on misunderstandings of treaties or mischaracterizations of treaty rights can render a process inadequate and unreasonable at law.⁵⁰

These improvements can largely be done through enhancements to ATRIS. In the context of historic treaties, ATRIS could be improved by providing plainer language summaries of specific treaty rights and entitlements,⁵¹ any relevant land surrender provisions, any claims related to the interpretation of such provisions in the treaties and Canada's position on those claims (limited to

⁴⁸ For example, the lack of guidance has sometimes led federal officials to attempt to apply concepts like strength of claim (which only applies to asserted rights) or attempt to determine depth of consultation according to common law principles when it is prescribed in the modern treaty. It has also led industry to request information on historic land use, which is not relevant to assessing impacts as the geographic scope and extent of modern treaty rights are governed by the treaty terms regardless of whether they align with historic use or not.

⁴⁹ Government of Canada, *The Government of Canada takes action to establish an effective whole-of-government approach to modern treaty implementation*, July 13, 2015, online: <http://news.gc.ca/web/article-en.do?nid=1000209>

⁵⁰ *West Moberly First Nations v. British Columbia*, [2011] B.C.J. No. 942 (CA) at para. 151 ("West Moberly"). See also *Chartrand v. British Columbia*, [2015] BCCA 345 (CA)

⁵¹ There are some plain language versions of historic treaties in ATRIS but the language and focus of these summaries could be simplified to clearly explain in simple terms on what specific rights are recognized under the treaty, the geographic scope of where each of the rights may be currently exercised within the treaty settlement area with links to any information on current land and fisheries use, any land surrender provisions, and any disputes relating to these provisions. In some cases, ATRIS only provides a summary of a series of treaties (i.e. Southern Ontario Treaties – 1764-1862) without indicating which treaty or treaties the particular First Nation is party to or providing a plain language summary of the specific treaties at issue.

federal officials if privileged),⁵² rights assertions beyond historic treaties⁵³, and any relevant interpretative aids such as reports of Treaty Commissioners.⁵⁴

With respect to modern treaties, ATRIS should be enhanced to include direct links to maps of the treaty settlement lands and the locations for all harvesting rights, a summary of harvesting rights and any other treaty rights associated with lands and waters, and any consultation obligations set out in the treaty.⁵⁵ Particular attention should also be paid to highlight areas where treaty obligations diverge from the duty to consult case law as this has resulted in a number of issues that could have been avoided with proper guidance and information-sharing.⁵⁶

In addition to enhancements to ATRIS, the federal government should do a better job at treaty specific education and training. This will likely be addressed in part through the Cabinet Directive on Modern Treaty Implementation. However, this directive does not cover historic treaties and there should be focused training for consultation in the context of treaties. This topic is addressed in part by current training for federal officials but it is presently too high level and does not provide sufficient training on topics such as how the duty to consult may differ under modern treaties, examples of specific modern treaty consultation obligations where there have been challenges with implementation, how to address differing interpretations of historic treaties, and other legal instruments that may impact consultation such as the 1870 Rupert's Land and North-Western Territory Order.



RECOMMENDATIONS:

9. Canada should significantly enhance the training and information available on historic and modern treaties for the purposes of consultation, including providing more detailed and easy to understand information in ATRIS on the geographic

⁵² For example, there are several active cases in litigation relating to the interpretation of historic treaties, including Treaty 7, Treaty 9, the Robinson-Superior Treaty, and Treaty 72. However, not all of the cases are in ATRIS. In addition, there is a lack of information in ATRIS about treaty land entitlement agreements and asserted or acknowledged unfulfilled obligations which can be raised in the context of consultation.

⁵³ Some First Nations with historic treaties assert additional Aboriginal rights that they say were not surrendered by treaty, such as Aboriginal hunting, trapping, fishing rights (if not addressed in the specific treaty) and Aboriginal title to waterbeds. The issue of whether Aboriginal title can be established to waterbeds has not been judicially considered to date in Canada.

⁵⁴ For example, several courts interpreting Treaty 8 have relied upon additional assurances provided by the Treaty Commissioners during treaty negotiations, which were noted in their report to the Superintendent General of Indian Affairs on September 22, 1899. See *West Moberly, Mikisew Cree, and R. v. Badger*, [1996] 1 S.C.R. 771 (SCC).

⁵⁵ For modern treaties, ATRIS currently contains a copy of the actual treaty which is typically hundreds of pages long. With some exceptions, there are generally no summaries on ATRIS of specific treaty rights that may be relevant for consultation or easy to access maps of harvesting areas and treaty settlement lands (without having to search through the treaties themselves). In some cases, there are short overviews of the treaty or Excel spreadsheets of treaty obligations but these spreadsheets were not created specifically for consultation or organized in a helpful way for this purpose.

⁵⁶ Examples of this include (i) requirements to consult even where there is no adverse effect (ii) additional assessments required over and above the federal and provincial environmental assessment regimes such as Chapter 10 in the *Nisga'a Final Agreement* and (iii) treaties where the entity to consult varies depending on the issue, such as the Nunavut Land Claim Agreement.

scope and content of historic and modern treaty rights, any unresolved claims relating to the interpretation of those rights, and all consultation obligations in modern treaties.

NON-STATUS, UNRECOGNIZED GROUPS AND HEREDITARY GOVERNANCE SYSTEMS

In this engagement, I also heard concerns about the federal government not consulting with non-status Indian organizations like the Congress of Aboriginal Peoples and its provincial affiliates as well as Aboriginal groups that are not formally recognized by the federal government⁵⁷ or the hereditary governance systems of certain First Nations that have maintained these systems along with elected *Indian Act* councils.⁵⁸

There is an absence of guidance for federal officials and industry on whether and how to consult with these groups and organizations. This may become an increasing focus for non-status Indian organizations due to expectations arising from the SCC's recent decision in *Daniels v. Canada*, even though the decision did not alter the existing law on the duty to consult. This decision confirmed that non-status Indians and Métis are included in the definition of "Indians" in s. 91(24) of the *Constitution Act, 1867* and thus under federal jurisdiction. This decision did not deal with s. 35 rights, which are the rights which engage the duty to consult, and the SCC expressly declined to grant a general declaration on this issue.⁵⁹

Greater clarity is needed on the federal government's position in all three areas but it is a complicated and context specific issue which depends on whether these groups or organizations are proper s. 35 rights-holding collectives and the modern day successors of the historical Aboriginal community that held the particular s. 35 rights at issue. This is because the duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds the s. 35 rights at issue or is authorized by that rights-holding group to represent it for this specific purpose.⁶⁰ This is a particularly challenging requirement for many non-status Indian organizations to meet, although at least one province in Canada (Nova Scotia) requires officials and industry proponents to consult with the provincial non-status Indian organization and there are other public policy reasons to engage with these organizations beyond the legal duty to consult.

I do not feel that I am in a position to make any broad formal recommendations in this area due to the limited number of groups that I discussed these matters with, the context-specific nature of these issues, and, in the case of non-status Indian organizations, the conflicting positions of many *Indian Act* bands who assert that they are the s. 35 rights holding collective for their First Nation, regardless of whether members have *Indian Act* status or live on-reserve. However, greater guidance is needed for federal officials and industry proponents in all three

⁵⁷ There are several groups in Canada that assert Aboriginal or treaty rights but are not formally recognized by the federal government for a variety of reasons, such as the Passamaquoddy in New Brunswick, Nunatukavut in Labrador, or the Hwiltsum First Nation in British Columbia. Canada's approach to whether consultation is required with specific unrecognized groups has been inconsistent within and among departments and agencies to varying degrees.

⁵⁸ There are several First Nations that have maintained traditional non-*Indian Act* governance systems such as the Wet'suwet'en Hereditary Chiefs, the Gitksan Hereditary Chiefs, and the Gitanyow Hereditary Chiefs in northern British Columbia.

⁵⁹ In this appeal, the appellants requested a declaration that "Métis and non-status Indians have the rights to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples." The SCC declined to grant the requested declaration because it lacked practical utility since several SCC decisions "already recognized a context-specific duty to negotiate when Aboriginal rights are engaged." This is a much narrower legal principle than the requested declaration.

⁶⁰ *Behn v. Moulton Contracting Ltd.*, [2013] S.C.J. No. 26 (SCC) at para. 30.

areas and this could benefit from further engagement between the federal government and the appropriate affected groups and organizations.

Meaningful Consultation Requires a Specific Skillset

Another important way to ensure that meaningful consultation occurs is by making certain that those conducting consultations have the necessary skillset to do so. The federal government's approach to the duty to consult has been to provide overall guidance to departments and agencies on what is required but leave them with the discretion on how to operationalize this guidance within their respective mandates. In general, this has resulted in consultation being undertaken by officials within the sector of a department or agency that is responsible for the decision or by regional officials, rather than by a specialized team of consultation staff within each department and agency.

This approach can be problematic because it fails to recognize that a specific skillset is required to effectively consult with Aboriginal peoples. Consultation is an art that requires, among other things, strong interpersonal and collaborative skills, cultural awareness and sensitivity, out-of-the-box thinking, and a willingness to challenge the status quo. Federal officials are in essence, as one aptly put it, being asked to engage in "domestic diplomacy". Certain people have or are capable of developing the skillset, outlook, and enthusiasm required for effective consultation and relationship-building. Others do not, even though they may have other strengths and otherwise excel in their jobs.

One of the many interesting aspects of this engagement was trying to understand what, in particular, led some Aboriginal groups to report positive consultation experiences. In many of the cases involving the federal government, it related to specific individuals who were excelling in their positions. This underscores the importance of having the right people, with the right skillset in the right positions for consultation.

In my view, too many federal officials are tasked with undertaking Aboriginal consultation in the federal government as an add-on to their day jobs and without the appropriate support. With the exception of Parks Canada and to some degree CEAA, there should be a more experienced or specialized group within each department or agency to lead and facilitate consultations, working in conjunction with appropriate subject matter experts relevant to the decision at hand.

This does not mean that Aboriginal consultation and relationship building is only the concern of a few federal officials in each department or agency. All federal officials working in areas in which the duty to consult may be triggered, including senior officials, need to be thinking about consultation and how it can be used to improve the relationship with Aboriginal groups and decision-making in general. Subject matter experts and senior officials need to be actively involved in the consultation process and, to the extent possible, hear concerns directly. However, they would benefit from the expertise of consultation specialists to help facilitate discussions, particularly on more contentious issues. Having some continuity in the team of officials consulting for a specific department would also be beneficial for relationship building, as meaningful relationships cannot be developed between Aboriginal groups and hundreds of officials within each department.

RECOMMENDATIONS

- 10. Canada should identify the skillset required for meaningful consultation and ensure that officials with sufficient expertise and skills in Aboriginal consultation oversee the development of any consultation processes and facilitate any**

consultations with the support of appropriate subject matter experts within the federal government.

Promoting Greater Collaboration in the Consultation Process

Another area of concern related to the meaningfulness of consultation is the perceived unilateral approach of federal officials and some industry proponents in determining key issues that impact the nature and scope of consultation and accommodation. The structure of the 2011 Guidelines is likely not helping this issue as the document devotes 15 pages to pre-consultation analysis and planning by federal officials (largely without the input of Aboriginal groups) and only 5 pages to actual consultation and accommodation discussions with Aboriginal groups. Many Aboriginal groups felt that federal officials and certain industry proponents need to be more collaborative in their approach, particularly on issues like assessing impacts, strength of claim, and setting up the process for consultation.

ASSESSING IMPACTS

The assessment of potential adverse impacts on asserted or established Aboriginal or treaty rights is relevant both to determining the depth of consultation owed as well as any potential accommodation. Many Aboriginal groups criticized the federal government's approach to this issue, stating that it overly relies on proponents, does not sufficiently incorporate Aboriginal perspectives, and inappropriately limits the scope of impacts considered. Federal officials and industry proponents also raised concerns about the lack of clear guidance in this area. The concerns I heard highlighted the need for change in four areas.

First, the new guidance documents need to emphasize that determining impacts is not a unilateral exercise and that incorporating Aboriginal perspectives is critical to the meaningfulness of the process. Aboriginal groups felt that the 2011 Guidelines do not sufficiently emphasize this point. They rightly indicated that federal officials and industry proponents do not have all of the information necessary to determine impacts to rights and that any pre-consultation analysis must be re-assessed during the consultation process. To this end, the guidance should underscore that the pre-consultation assessment of impacts is preliminary and emphasize the importance of incorporating Aboriginal perspectives on impacts and Aboriginal traditional knowledge, and explain how best to do this.⁶¹



Second, there should be better guidance on the scope of potential impacts that may need to be considered and the type of information that should be obtained when discussing impacts with Aboriginal groups. Several Aboriginal groups indicated that federal officials and some industry proponents narrowly focus on adverse impacts to Aboriginal hunting, fishing and gathering and that insufficient attention is paid to impacts to asserted or established Aboriginal title, cultural or spiritual practices, burial or ceremonial sites, or cumulative effects. The 2011 Guidelines provide limited guidance on how to assess impacts. It states that “the nature and severity of adverse impacts depends on a variety of factors including: the scope and size of the activity, its

⁶¹ See, for example, Parks Canada, “The Land is Our Teacher – Reflections and Stories with Aboriginal Knowledge Holders to Manage Parks Canada’s Heritage Places.” 2015.

environmental effects, and whether the impact is permanent or temporary” and provides a list of questions and issues for consideration. However, these questions are largely focused on impacts to land, water and resources and do not speak specifically to impacts to cultural or spiritual practices or Aboriginal title or provide sufficient direction on how to assess the degree of any potential impact. The Draft Proponent Guidance is also similarly focused on environmental impacts of specific projects.

CEAA and Transport Canada have developed helpful internal guidance on how to assess the degree of impacts and something similar should be included in the new guidance for federal officials and industry along with the range of Aboriginal interests that may need to be considered in an impacts assessment.⁶² This is not intended to prescribe a rigid formula or approach but rather to provide greater guidance on issues to consider with Aboriginal groups when assessing impacts to asserted or established Aboriginal or treaty rights.

Third, there needs to be guidance on the reciprocal obligations or expectations of Aboriginal groups in discussing impacts on asserted and established Aboriginal rights. In some cases, Aboriginal groups are not providing sufficient information on which particular asserted or established rights might be adversely impacted by a particular Crown decision and precisely how. This makes it very challenging for federal officials or industry proponents to assess and appropriately address adverse impacts that are within the scope of the duty to consult.

Fourth, there needs to be better guidance on assessing cumulative effects on asserted or established Aboriginal rights. To be clear, the duty to consult is forward-looking and is not triggered by or about remedying past wrongs. It is also confined to the adverse impacts flowing from the specific Crown action or decision at issue.⁶³ However, the current context is relevant to determining the degree of future impacts. As a result, the cumulative impacts of past events on the ability of Aboriginal groups to exercise their asserted or established rights can be relevant to assessing the degree of additional impacts from the current decision at hand although the courts have not to date clearly articulated how this should be taken into account.⁶⁴

Many Aboriginal groups see cumulative effects as the elephant in the room that is not being adequately addressed. Some Aboriginal groups are surrounded by resource development projects and indicated that they are no longer able to meaningfully or easily practice their asserted or established rights. Other groups stated that their rights have not been compromised by one big project but rather by the slow creep of urbanization and routine federal decisions on resource allocations that have pushed their ability to exercise their rights to the edge. This reality poses challenges for consultation on resource development. Proponents are understandably focused on the additional incremental impacts of their projects but Aboriginal groups are often thinking about how past, present and future development have or will impact their communities and the ability to exercise their asserted or established rights.⁶⁵

The *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) requires cumulative effects be considered but is limited to cumulative environmental effects. There is also no specific

⁶² The CEAA and Transport Canada guidance examines the degree of impact by looking at the magnitude, extent, frequency, reversibility, probability of occurrence, Aboriginal perspectives on the importance and uniqueness of a particular use, and the level of confidence in the analysis.

⁶³ *Rio Tinto* at paras. 52-53.

⁶⁴ *Adam v. Canada (Minister of the Environment)*, [2014] F.C.J. No. 1248 (FC) at para. 85 (“Adam”); *West Moberly* at paras. 117, 181, and 235-239; *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, [2012] F.C.J. No. 330 (FCA) at para. 13.

⁶⁵ For a further discussion of this point, see Andrea Bradley and Michael McClurg, “Consultation and Cumulative Effects: Is there a role for the duty to consult in address concerns about over development”, OBA Aboriginal Law Section, Volume 15, No. 3, July 2012.

guidance on how to actually assess cumulative impacts on asserted or established Aboriginal and treaty rights. There needs to be greater thought and analysis around this issue in terms of what impacts are to be assessed, what specific criteria and base line information should be used, and what are the sustainable limits in a given situation. As part of this, consideration needs to be given to what cumulative impacts should be considered in the context of an individual project and what impacts are more appropriately considered or monitored in other broader processes. Canada should also clarify roles and responsibilities as between the Crown and proponents. Individual proponents are limited in what they can or can reasonably be expected to do in this area and this needs to be recognized and addressed by the federal government.

The federal government has begun some positive work in this area in response to Douglas Eyford's report *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*. Specifically, Environment and Climate Change Canada ("ECCC") and the Major Projects Management Office West are working with a number of BC Aboriginal groups to develop programs to assess cumulative effects in Prince Rupert, Burrard Inlet (near Vancouver), and northeast BC. These projects are still in the development stage but could be replicated elsewhere if they are successful.

It important to underscore that the federal government is only part of the solution on cumulative effects and the provinces and territories (with the exception of Nunavut) have a larger role given their greater responsibility for regulating natural resource development and that they are typically are much larger land owners.⁶⁶ That said, there needs to be more intergovernmental dialogue and cooperation to address this issue in a coordinated and proactive rather than reactive manner. This includes collecting and sharing regional baseline data as well as increasing Aboriginal participation in provincial land-use planning for lands subject to asserted or established Aboriginal rights claims.

Aboriginal participation in land-use planning is required in the territories under the various land claim agreements and the jointly developed plans are used to guide decision-making for the development, management and conservation of land, water and natural resources in the north. Although this process has taken place in a different legal climate and has not been without issues, more Aboriginal involvement in provincial land-use planning could reduce the number of issues that arise in consultation, provide greater certainty for resource development, and potentially avoid or mitigate concerns around cumulative effects. Canada has limited jurisdiction in land-use planning south of the 60th parallel but it could similarly support greater Aboriginal participation in land-use planning of reserve lands, federal Crown lands, and lands that may be added to reserves in the future, particularly areas that may be impacted by future linear projects.

⁶⁶ For example, in British Columbia, 94 per cent of the land base is provincial Crown land while only 1 per cent is federal Crown land. See British Columbia, Ministry of Agriculture and Lands, "Crown Land Factsheet," online. http://tonydorcey.ca/Omnibus/crownland_factsheet.pdf

RECOMMENDATIONS

11. **Canada should provide more detailed guidance and tools to federal officials and industry on the range of Aboriginal interests that may need to be considered in an impacts assessment for consultation, how to assess the nature, degree, and likelihood of these impacts, and how to work with Aboriginal groups and incorporate Aboriginal perspectives and traditional knowledge in this area. Canada should also provide guidance on the reciprocal obligations and expectations of Aboriginal groups in providing information on adverse impacts to asserted or established rights.**
12. **Canada should work with the provinces and territories to take a coordinated approach to assessing and addressing cumulative effects on Aboriginal and treaty rights, including in the collection and sharing of regional baseline data, and provide more detailed guidance to federal officials and industry how to assess cumulative effects and the respective roles and responsibilities of Canada and industry in this area.**

STRENGTH OF CLAIM

Another area where Aboriginal groups feel that there is insufficient collaboration (and transparency) is the assessment of strength of claim, which is relevant to determining both the depth of consultation and potential accommodation required.

Some Aboriginal groups expressed frustration that federal officials will tell them that their claims have been assessed at specific levels (i.e. low, medium/moderate or high) but refuse to provide a copy of the strength of claim opinion because it is privileged. Strength of claim is also a challenging area for federal officials and industry. Numerous federal officials told me that they need more guidance and many without legal training indicated that they do not feel qualified to undertake this work. There are also instances where provinces, the federal government, and proponents do not reach the same conclusion on specific strength of claim assessments because of different understandings of Aboriginal interests in the particular area.

In some cases, Aboriginal groups, federal officials and industry appear to place too much emphasis on strength of claim in the context of consultation. It is not supposed to be a rights determination exercise but rather a “preliminary assessment” of strength of claim. In most cases, the degree of consultation required is more driven by the potential impacts than the strength of claim. This does not mean that it is unnecessary to assess strength of claim for asserted rights or to review additional information provided by Aboriginal groups in the consultation process that may impact the degree of consultation required. Strength of claim can also be particularly important for accommodation, shared territories/overlapping claims, and determining the proper rights-holding group. However, it can also be a barrier to discussing impacts if it is overly focused on because there are frequent disagreements in this area.

Based on the concerns raised, I believe that there are a couple of ways that the federal government could improve its approach to strength of claim to ensure greater collaboration and that this issue does not become an impediment to discussing impacts.

First, Canada should provide clearer guidance on how a “preliminary assessment” should be undertaken, who should undertake it, and when a full strength of claim assessment is required instead. Several federal officials indicated that this assessment should be undertaken by a specialized team with legal training or other relevant ethnohistorical expertise. In my view, this depends upon what is actually required for a preliminary assessment. However, at a minimum,

there should be a regional or central team with appropriate expertise that is responsible for overseeing all strength of claim assessments to ensure consistency in approach, accuracy, and sharing of relevant information and full strength of claim assessments should be done by these teams. These teams could also deal with differing interpretations of historic treaties to ensure a consistent of approach to treaty rights analysis across the federal government. There is a lack of consensus on the interpretation of certain historic treaties in the federal government and greater central leadership is required to ensure a consistent and considered approach.

Second, the federal government needs to emphasize that determining strength of claim is not a unilateral exercise. It cannot be assumed that Canada has all of the relevant information to determine this matter or that the federal officials tasked with this have access to all of the relevant information that the federal government may have. To this end, Canada should provide guidance to federal officials on what they can share regarding federal strength of claim assessments with Aboriginal groups and proponents and on how to communicate a preliminary assessment of strength of claim in a way that ensures an open dialogue with Aboriginal groups.

While there may be issues of privilege that prevent disclosure of the opinion, this matter could be addressed by, at a minimum, providing a list of all of the information that was relied upon along with the conclusion. This would allow the Aboriginal group or the proponent to identify and provide any additional missing information that could impact the assessment.

RECOMMENDATIONS

- 13. Canada should clarify for federal officials what is required for a “preliminary assessment” of strength of claim, who it should be conducted by, and what oversight measures will be put in place to ensure accuracy, consistency and sharing of relevant information. Canada should also provide guidance to federal officials on how to work with Aboriginal groups and proponents on issues relating to strength of claim in a way that ensures transparency and a respectful dialogue.**

CONSULTING ABOUT THE PROCESS

Many Aboriginal groups expressed frustration that federal officials and some proponents unilaterally develop consultation plans or design consultation processes without the input of Aboriginal groups. Some Aboriginal groups were also concerned that departments like the Department of Fisheries and Oceans Canada (“DFO”) rely in some instances on multi-stakeholder engagement processes to consult on specific decisions (e.g. meeting with representatives of the recreational, commercial and Aboriginal fisheries together rather than meeting with Aboriginal groups separately), which they feel is not a conducive environment in which to raise their concerns.⁶⁷



Many Aboriginal groups in this engagement stated that the first step in any successful consultation is to consult on the process, including issues like the nature of information that will be provided and the timing for response. Many Aboriginal groups have developed their own

⁶⁷ DFO officials indicated that it is useful to have all parties at the table so they hear the perspectives of each other and that DFO does not, in any event, have the resources to do separate meetings in all instances. This is not to say that DFO does not consult directly with Aboriginal groups as they do in many cases.

policies on how they wish to be consulted and feel that they are essentially ignored by federal officials.

The 2011 Guidelines state that federal officials should “consider involving Aboriginal groups in the design of effective consultation processes” but it is not required. Notably, the guidance of certain departments and agencies like the Canadian Nuclear Safety Commission (“CNSC”) and ECCC go much further, by encouraging industry to ask Aboriginal groups how they would like to be engaged⁶⁸ or by directing federal officials to make efforts to respect consultation policies developed by Aboriginal groups “as may be reasonable and appropriate in the circumstances”.⁶⁹ The new guidance for federal officials and industry should encourage both to the extent possible. However, there needs to be a reasonableness qualifier about Aboriginal consultation policies as Aboriginal groups have reciprocal obligations not to frustrate the process or impose unreasonable requirements,⁷⁰ such as the imposition of inappropriate or excessive fees.

Consulting on the process can be a challenge for decisions that impact a large number of Aboriginal groups like pipelines or national policy and regulatory changes, the latter of which will be discussed later in this section. Earlier engagement may alleviate some of the common process concerns. However, Aboriginal groups also need to be flexible in developing a meaningful but workable process rather than insisting on a particular approach that is not feasible given the number of Aboriginal groups that need to be consulted or that may not be appropriate to the potential impacts or the wide variation of potential impacts amongst the Aboriginal groups being consulted.

Discussions about the process with Aboriginal groups do not need to start at square one in each case if there is a prior process that can be replicated or refined. For the federal government, consultation protocols can be an effective way to address process concerns in a more systematic way. To date, the federal government has used consultation protocols to support capacity building, aggregation, and clarity on whom to consult rather than providing greater specificity around the actual process as other jurisdictions like BC have done.⁷¹ Canada currently has consultation protocols with aggregates of First Nations in Nova Scotia, New Brunswick, Prince Edward Island as well as the Métis Nation of Ontario and the Algonquins of Ontario.

Some Aboriginal groups liked the flexibility of the federal approach but others were concerned about the continued lack of clarity. In addition, two of the aggregate groups with protocols that I met with also expressed frustration that federal departments and agencies do not always follow the protocol and are instead dealing directly with the individual Aboriginal groups. They feel that Canada should inform the aggregate (and the province, where appropriate) if the federal government is going to follow an alternative approach.

⁶⁸ CNSC, REGDOC 3.2.2: *Aboriginal Engagement*, online: <http://nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc3-2-2/index.cfm>

⁶⁹ Environment and Climate Change Canada, *Policy on Public Participation and Aboriginal Consultations*

⁷⁰ *Haida* at para. 42; *Halfway River* at para. 161; *Long Plain* at para. 158. The advice on this issue in the Draft Proponent Guidance should be revised. It states “ask potentially affected Aboriginal groups how they wish to collaborate with your company”. While collaboration is desirable in many cases, it is not always achievable or even desired by some Aboriginal groups. The direction should be for proponents to ask how the Aboriginal groups want to be consulted.

⁷¹ Similar to the 2011 Guidelines, the protocols require Canada to provide “all relevant information” and for the Aboriginal groups to respond “within a reasonable period of time”. This differs significantly from the approach taken by British Columbia, which has detailed Strategic Engagement Agreements with specific required steps and timelines depending on the classified level of decision.

Consultation protocols are a good way to provide greater clarity around shared expectations, including on consultation obligations in modern treaties where necessary. Canada has had some success on consultation protocols but the federal government should be more open to different approaches to consultation protocols and ensure that departments and agencies follow the process set out by the protocol to the extent possible.

RECOMMENDATIONS

- 14. Canada should encourage federal officials and industry in any new guidance to seek input from Aboriginal groups on how they wish to be consulted for a particular decision and have regard to consultation policies of Aboriginal groups where reasonable and appropriate.**
- 15. Canada should be more nuanced in its approach to consultation protocols, including having more prescriptive language or sub-protocols on specific issues where desired and entering into protocols with individual Aboriginal groups in areas of significant federal activity where this would bring needed clarity to the process.**

Ensuring Appropriate and Timely Information Sharing

Aboriginal groups frequently raised concerns about the timeliness of consultation and sufficiency of information that they receive from federal officials and industry in consultation. The 2011 Guidelines do not provide much assistance on these issues. It states that federal officials should provide “adequate notice” and disclose “relevant information” but does not shed any light on what “adequate notice” or “relevant information” would be. The Draft Proponent Guidance is similarly vague, stating that proponents should provide “clear and relevant information” on the proposed activity and any adverse impacts in a “timely manner” and “with enough time to assess any adverse impacts of the proposed activity on their rights.”

More specific guidance is needed as federal officials and industry struggle with these issues. It is also an unnecessary source of frustration for Aboriginal groups that is undermining the perceived meaningfulness of consultation. This greater guidance is not intended to prescribe a ceiling but rather a minimum floor of what is required for meaningful consultation.

With respect to “relevant information”, Aboriginal groups reported that they often do not get certain basic information that they feel is needed to determine potential impacts on their rights, such as quality mapping. They also indicated that Canada generally provides very little information about its rationale for the scope and depth of consultation proposed or the federal government’s preliminary views on the potential impacts on asserted or established rights. With respect to proponents, Aboriginal groups stated that the quality of information varies – some are upfront and provide sufficient disclosure while others provide limited information which requires significant follow-up.



Although the nature of information required varies with the decision, Canada can and should provide better guidance on the type of information that, at a minimum, should be included in an introductory letter and information package. This could be supplemented by department and

agency specific guidance for particular decisions based on discussions with Aboriginal groups about what information they require. Several provinces like Nova Scotia have guidance on this which Canada should consider as a start in devising its own list.⁷² This guidance should address both project related decisions as well as other resource and land management, policy, regulatory, and legislative decisions.⁷³

In terms of the sufficiency of notice, Aboriginal groups raised a number of concerns about how early they are notified and consulted and the amount of time that they are given to respond. There were several examples where Aboriginal groups were given 2 or 3 weeks to review and respond to a complex matter that required reviewing hundreds of pages and/or outside expertise. Aboriginal groups also raised concerns about the lack of flexibility and the fact that timelines often do not take into account their cultural calendars.

Short inflexible timelines are problematic for Aboriginal groups for a number of reasons. First, they assume Aboriginal groups have adequate baseline information on where members are exercising their asserted or established Aboriginal rights and can easily assess impacts. This is not the case in many instances. Second, they do not take into account the resource restraints of Aboriginal groups and the fact that consultation matters are often handled by people with multiple responsibilities. Third, they may not account for the complexity of the matter and the possible need for expert advice. Fourth, they may not be compatible with the timing of decision-making processes of Aboriginal groups, including the fact that Chief and Council typically only meet once a month.

There are, however, other concerns and interests that need to be balanced. For example, some resource management decisions need to be made quickly.⁷⁴ Canada also needs to appropriately weigh the rights and interests of both Aboriginal groups and industry proponents. The SCC has held that good government requires decisions to be made in a timely way, and has emphasized the right of third parties to have government decisions made in a procedurally fair manner and within a reasonable time.⁷⁵

While there are legislated timelines for environmental assessments under CEEA 2012, there is very little consistency outside of environmental assessments regarding how much time Aboriginal groups are given to respond on a given issue even within the same department. Some provinces have addressed this issue by stipulating specific notice times for all decisions that fall within a particular consultation level – e.g. 15 days business days for consultation at the low level. Aboriginal groups do not like these set timelines because they feel it is a cookie-cutter approach that does not take into account the nuances of a particular issue and the situation of the Aboriginal group. On the other hand, many industry proponents prefer this fixed timeline model because it provides predictability. Some industry proponents expressed frustration with the lack of timelines for certain federal permits and authorizations, such as

⁷² Government of Nova Scotia, *Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia*, April 2015, p. 21; Government of Saskatchewan, *First Nation and Metis Consultation Policy Framework*, June 2010, pp. 11-12; Government of British Columbia, *Updated Procedures for Meeting Legal Obligations when Consulting First Nations*, May 2010, p. 14.

⁷³ It should be noted that concern was raised with the statement in the Draft Proponent Guidance that “the nature and extent of information required by each Aboriginal group may vary, as groups have differing levels of technical capacity.” It was felt that this suggests a lesser level of disclosure is required if an Aboriginal group lacked technical capacity. While this was likely not the intent of the statement, this should be revised to reflect that some Aboriginal groups may need additional information and capacity support (financial or in-kind) to address technical capacity issues.

⁷⁴ Better relationships and transparency on the rationale for such decisions and short notice may help to address concerns of Aboriginal groups in these situations.

⁷⁵ *Little Salmon/Carmacks* at paras. 12 & 35.

authorizations relating to reserve land. This understandably makes it very difficult for them to plan their business activities.

There is a need for timelines but they must be reasonable and appropriate to both the depth of consultation required and the complexity of the matter at issue. In order to achieve this, Canada should develop consistent timelines for consultation on specific types of decisions – i.e. policy and regulatory changes, fisheries management decisions, and other specific permits and authorizations. Where possible, and particularly for decisions that are not time-sensitive, there should be some flexibility to extend timelines for cultural or community considerations that could impact availability, such as the summer Aboriginal fishery season, although such extensions must be made in a way that balances the rights of any affected third-parties to timely decision-making.

RECOMMENDATIONS

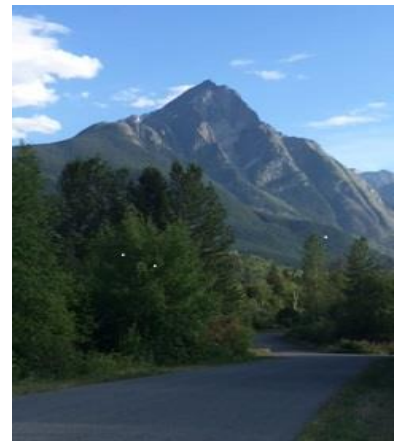
16. Canada should provide additional guidance to federal officials and industry on the type of information that should at a minimum be provided to Aboriginal groups at the outset of and during consultation on resource development projects, fisheries, wildlife, and land management decisions, and policy, regulatory, and legislative changes.

17. Federal departments and agencies should develop reasonable and consistent timelines for consultation on specific types of federal decisions.

Refining Canada’s Reliance on Regulatory Processes

Aboriginal groups frequently raised concerns about Canada’s reliance on regulatory processes to fulfill the duty to consult. They feel that these processes do not allow for meaningful consultation or the direct nation-to-nation dialogue that they desire.

Canada’s reliance on existing regulatory and environmental review processes to fulfil the duty to consult is consistent with the jurisprudence in principle⁷⁶ and the courts have held that Aboriginal groups have an obligation to use these processes to address their concerns as long as they are adequate, accessible, and provide an opportunity to meaningfully participate.⁷⁷ In August 2015, the Federal Court of Appeal held that there were “strong practical reasons” to rely on regulatory processes to fulfill the duty to consult but in all cases the Crown must “assess whether additional consultation activities or accommodation is required in order to satisfy the Honour of the Crown.”⁷⁸



Although each case depends on its facts, the courts have found in several cases that Canada has met the duty to consult when it relied in whole or in large part on regulatory processes such as the National Energy Board (“NEB”), the licensing process of the CNSC, or the environmental

⁷⁶ *Little Salmon/Carmacks* at para. 39 and *Taku River* at para. 40.

⁷⁷ *Brokenhead* at para. 42.

⁷⁸ *Hamlet of Clyde River v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991 (FCA) at para. 65. This case is currently under appeal to the SCC.

assessment process of CEAA.⁷⁹ Despite this, Aboriginal groups continue to have significant issues with Canada's approach, particularly its reliance on the NEB and CEAA review panel processes.

First, Aboriginal groups indicated that they did not like the adversarial process of the NEB or CEAA review panels. They felt it is inappropriate for Canada to rely so heavily on processes that were not designed with Aboriginal and treaty rights in mind. They thought these processes are too legalistic and that the rules of evidence and statutory mandates preclude a meaningful discussion of their concerns, particularly impacts to asserted Aboriginal title and cultural and spiritual practices.⁸⁰

Second, many Aboriginal groups questioned the rigour of these processes and suggested they simply provide an opportunity for Aboriginal groups to "blow-off steam" or are at most an information gathering exercise. Some Aboriginal groups also felt that the NEB and CEAA do not have the necessary expertise and knowledge of Aboriginal communities, cultures and rights. However, this was not a uniform view with respect to CEAA and several Aboriginal groups, particularly in Atlantic Canada, spoke highly of their experience with the agency.

Third, Aboriginal groups felt that federal officials largely ignore the direction to assess whether additional consultation activities beyond the regulatory process are necessary. Indeed, there is a lack of machinery in the federal government to ensure that potential impacts that fall outside of the scope of a regulatory process but are within federal jurisdiction are dealt with in a timely and consistent manner. While side tables have been set up in some instances to deal with issues outside the process, this is the exception and not the norm.

Aboriginal groups indicated that the limits of statutory mandates are even more problematic when an environmental assessment is not required under CEAA 2012 as decision-makers acting under other statutes are often confined to a more narrow range of factors to consider that are not necessarily aligned with the requirements of consultation and accommodation. Statutory mandates do not relieve decision makers of the duty to consult on federal Crown conduct. They are required to respect legal and constitutional limits, and the duty to consult lies upstream of the statutory mandate of decision-makers.⁸¹ Statutory mandates either need to be expanded to bring them in line with the Crown's consultation and accommodation obligations and/or there needs to be some mechanism to ensure that issues within the scope of the duty to consult are considered by the appropriate federal entity. This must be resolved and simply stating that Canada has or will take a "whole-of-government" approach to consultation is not a solution. There need to be mechanisms to ensure this happens.

Fourth, Aboriginal groups are upset that the federal government does not always engage in direct consultation for resource development projects and, when it does, they feel it occurs too late in the process. Aboriginal groups indicated that waiting until after a review panel report is released to consult does not provide sufficient time to discuss and consider concerns that were not addressed in the regulatory process, particularly given the short window of time before a

⁷⁹ *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, [2015] F.C.J. No. 829 (CA), *Brokenhead*, and *Adam*.

⁸⁰ Cultural and spiritual impacts can be considered under CEAA 2012 but there are ongoing issues about how these assessments should be conducted, how to properly incorporate Aboriginal perspectives on impacts, and what appropriate accommodation measures are available. CEAA recently issued draft technical guidance on this for comment. See *Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the Canadian Environmental Assessment Act, 2012*, <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=0CF7E820-1>

⁸¹ *West Moberly* at para. 106. *Wahgoshig First Nation v. Ontario*, [2012] 3 C.N.L.R. 317 (SCJ) at para. 41; *Ross River Dena Council v. Yukon*, [2012] Y.J. No. 123 (CA) at paras. 36-37.

decision has to be made. Federal officials do track concerns raised in panel hearings and meet with Aboriginal groups prior to the regulatory process commencing. However, historically these discussions have been only to explain how the process will work and how to apply for capacity funding. Aboriginal groups, many industry proponents, and some federal officials believe that Canada should be at the table earlier, particularly when there are impacts or related issues that cannot be adequately dealt with through the regulatory process. Some federal officials also raised concerns about federal staffing and resources for consultation on major linear projects. I agree that this has been inadequate and should be enhanced.

Although these processes have not been successfully challenged in court to date, these concerns have real consequences. Even if unsuccessful, frequent court challenges to projects cause delay, increase risk and cost, and potentially reduce the likelihood of future investment. Dissatisfaction with existing provincial and federal regulatory processes has also led some Aboriginal groups to begin establishing their own environmental assessment processes, which create inconsistent requirements and additional regulatory uncertainty. These concerns can also negatively impact the federal government's relationship with affected Aboriginal groups.

Rigorous regulatory processes can be an effective means of addressing a very large portion of impacts to asserted or established Aboriginal rights and title and it makes no sense to have duplicative processes. However, every process has its limits. The new federal government has made a number of commitments that may lead to changes in this area, including modernizing the NEB to ensure, among other things, that it has sufficient expertise in Indigenous traditional knowledge.⁸² It has also committed to reviewing Canada's environmental assessment processes as well as all other laws, policies, and operational practices to ensure compliance with Canada's consultation and accommodation obligations.⁸³ However, simply modernizing the NEB or adjusting the regulatory mandates of CEAA and the NEB will likely not resolve these issues. I recommend three additional improvements.

First, any pre-hearing engagement of Aboriginal groups by federal officials should not be limited to procedural issues. Aboriginal groups should be able to raise their initial concerns about a project prior to the regulatory process. This will enable federal officials to identify early on which issues can likely be dealt with in the regulatory process, which issues will need to be dealt with through a separate process, and which fall outside of the federal government's jurisdiction. CEAA has started engaging on Environmental Impact Statements filed by proponents prior to hearings but there is still typically no engagement with Aboriginal groups on substantive issues prior to NEB hearings, although the new process for Energy East is a positive exception.⁸⁴

Second, once issues are identified and categorized in the pre-hearing engagement, there should be a mechanism early in the process to assign federal responsibility for issues that fall outside of the statutory mandates of CEAA, the NEB, or other federal regulators but are still

⁸² Mandate Letter from Prime Minister Justin Trudeau to the Minister of Natural Resources, <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

⁸³ Mandate Letter from Prime Minister Justin Trudeau to the Minister of Indigenous and Northern Affairs Canada, <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter> The federal government has announced five principles that will guide its decision-making on major projects while the review of Canada's environmental assessment process is underway. See *Government of Canada Moves to Restore Trust in Environmental Assessment*, <http://news.gc.ca/web/article-en.do?nid=1029999>

⁸⁴ For the Energy East Project, the federal government is proposing to enhance its approach to Crown consultations, subject to further discussions with Aboriginal groups. This would include appointing five regional consultation coordinators (RCCs) that could meet regularly with Aboriginal groups to discuss concerns relating to the project. The RCCs would report to a Crown Consultation Lead in Ottawa. Subject to interest, the RCCs could also meet with Aboriginal groups along with other federal government and provincial government officials and/or the proponent.

within federal jurisdiction and relate to potential impacts from the project. While some of these issues may warrant a broader discussion at the MPMO Deputies Committee where there is no department or agency willing to take responsibility, the resolution of such issues should not depend on getting on the agenda of the MPMO Deputies Committee. A specific protocol with timelines should be developed and a federal entity like the Major Projects Management Office should be empowered to assign responsibility to the appropriate department or agency if agreement cannot be reached among potentially impacted federal departments or agencies. There also needs to be greater guidance for federal officials on how to deal with Aboriginal concerns that do not fall within federal jurisdiction or are not tied to potential adverse impacts from the Crown decision at issue and should be dealt with in a separate process on a different time track to ensure that consultations do not get unnecessarily side-tracked.

Third, Canada should be prepared to make use of the provisions in CEAA 2012 to allow for short extensions where necessary to address outstanding concerns of Aboriginal groups. Predictable timelines are beneficial but they are of little help if the project is subsequently delayed with protracted litigation because concerns were not adequately addressed at an earlier juncture. In some cases, there is an obvious impasse and no amount of additional time will resolve the issue. However, in other cases, additional time may allow for issues to be resolved or may be otherwise necessary to ensure meaningful consultation. Time extensions should, however, still remain the exception and not the rule. Earlier engagement, increased federal staffing for major projects, and policy mandates to address commonly raised issues like Aboriginal title will likely obviate the need for most extensions. Any extension of timelines should be done in close consultation with affected proponents and in compliance with obligations of procedural fairness.

RECOMMENDATIONS

- 18. Canada should ensure that federal officials engage with potentially affected Aboriginal groups prior to the commencement of NEB hearings for major projects and CEAA review panels in order to discuss concerns with the proposed project and identify any issues within federal jurisdiction that go beyond the mandate of the regulatory body and may require a separate process.**
- 19. Canada should establish a process to assign responsibility for federal issues raised in consultation that fall outside the statutory mandates of the federal regulator(s) involved and empower a federal authority to assign responsibility for the issue if an agreement cannot be reached as between potentially affected departments and agencies.**

Improving Consultation on Policy, Regulatory and Legislative Changes

Another area where Aboriginal groups raised concerns about the meaningfulness of consultation was on federal policy, regulatory and legislative changes. Federal officials also frequently indicated that they need more guidance in this area.

In *Rio Tinto*, the SCC held that the duty to consult can be triggered by strategic, higher level decisions such as the approval of a multi-year forest management plan or the establishment of a review process for a major gas pipeline approval. The Federal Court of Canada also recently held that the duty can be triggered by the introduction of legislation that may adversely impact

asserted or established Aboriginal or treaty rights although this decision is currently under appeal.⁸⁵

Consulting on policy, regulatory and legislative changes that may adversely impact asserted or established Aboriginal or treaty rights is an area in which federal officials are struggling. In some cases, it is simply not happening. In other instances, it is being done but on a concept at 35,000 feet or too late in the process and with national or regional Aboriginal organizations or Tribal Councils, the vast majority of which do not have the authority to speak for rights-holders in consultation. This is not to say these organizations should not be consulted as well, where appropriate. However, these consultations are not sufficient in themselves to discharge the Crown's duty to consult unless the organizations have the explicit authority to speak for the affected rights-holding group.

There needs to be much more guidance on how and when to consult with respect to policy, regulatory and legislative changes as well as international agreements that may adversely impact asserted or established Aboriginal or treaty rights, none of which are addressed in detail in the 2011 Guidelines. This includes when and whom to consult and best practices on the nature of information and amount of notice and response time to provide. Related to this, there should also be a requirement that all Memoranda to Cabinet include an assessment of whether the duty to consult is triggered by any proposed changes and, if so, how it was addressed. This could be similar to what is now required for modern treaties in the Cabinet Directive on the Federal Approach to Modern Treaty Implementation.

Consultation on legislation is a particularly thorny issue but it is not going away. Regardless of the outcome of the appeal in *Mikisew Cree First Nation v. Canada*, Canada should take a more consistent approach to this issue. In its 2014 decision in *Mikisew Cree*, the Federal Court of Canada held that the federal government should have given notice to the Mikisew Cree together with an opportunity to make submissions upon the introduction of two omnibus bills that made significant changes to Canada's environmental laws. Notably, the Court found that the duty to consult did not arise until after the legislation was introduced in Parliament and that the duty was at the low end of the spectrum (notice and an opportunity to respond). This finding is not consistent with the expectations of Aboriginal groups who want to be consulted long before legislation that may affect their rights is even introduced. This is an area where, in some cases, Canada may want to go beyond what is strictly required at law in order to ensure more meaningful consultation and avoid damaging its relationship with Aboriginal groups. There are recent examples of the federal government consulting long before the introduction of legislation but there has not been a consistent approach to this.⁸⁶



One of the biggest hurdles to addressing this issue is the sheer magnitude and difficulty of conducting consultations with hundreds of Aboriginal groups and organizations on issues that

⁸⁵ *Mikisew Cree First Nation v. Canada*, [2014] F.C.J. 1308 (F.C.)

⁸⁶ For example, INAC consulted with Aboriginal groups before the introduction of the *Specific Claims Tribunal Act*, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and the *First Nations Control of First Nations Education Act*. While these processes and the underlying legislation have been subject to substantial criticism by Aboriginal groups, there are lessons that can be learned from these processes in terms of formulating best practices going forward.

have potential impacts across the country. Some Aboriginal groups take the position that this is Canada's problem to sort out. This perspective is not particularly helpful to finding a way forward. Aboriginal groups and organizations should be part of the solution and work with the federal government to find a meaningful but manageable process to get input on policy, regulatory and legislative changes that may adversely impact Aboriginal or treaty rights across the country, potentially through aggregation in each region. It is in their interests to do so, particularly if they want to be consulted prior to the introduction of legislation and at a higher level than notice and an opportunity to make submissions.

RECOMMENDATIONS

- 20. Canada should provide additional guidance to federal officials on when and how to consult on policy, regulatory and legislative changes that may adversely affect asserted or established Aboriginal or treaty rights. As part of this, Canada should require Memoranda to Cabinet to include an assessment of whether the duty to consult is triggered by any proposed changes and if so, who was consulted, what concerns were raised, and how they were addressed.**
- 21. Indigenous and Northern Affairs Canada together with other key affected departments should engage with representatives of Aboriginal rights holders on consultation to discuss appropriate fora and processes for consulting on national policy, regulatory, and legislative changes that may adversely affect asserted or established Aboriginal or treaty rights.**

Access to Decision-Makers and Mandates

Several Aboriginal groups raised concerns that consultation is frequently delegated to lower level federal officials who do not have decision-making authority and can only listen and gather information. Some expressed frustration that they engage in good faith consultation only to be told by federal officials that they do not have the mandate or authority to address certain issues that the Aboriginal group wants to discuss. Others raised concerns about the lack of access to and face-to-face meetings with federal officials altogether for consultation.

From a practical standpoint, it is not possible for the most senior officials in departments and agencies to attend all consultation meetings with Aboriginal groups given the sheer number of consultations and their other responsibilities. Moreover, on any given issue, there are multiple people involved in making a decision even within a department. There are also many issues that may fall within the jurisdiction of another department or that, in the case of resource development projects, proponents may be better positioned to deal with.

These concerns about access to decision-makers and mandates can largely be addressed through the implementation of other recommendations in this report. Indeed, part of this frustration links back to the overall lack of a relationship and other effective fora to address broader concerns. Efforts to improve the relationship and better address Aboriginal priorities or provide other forums to advance those matters could help mitigate this issue.

For resource development projects, the federal government can better ensure it has the right people in the room through the early identification of and assignment of responsibility for issues that fall outside of the mandates of a particular regulatory process. On more contentious decisions, consideration could also be given to having more senior officials participate in consultations or altering the reporting structure to ensure that those conducting the consultation have a more direct line to the respective Assistant Deputy Minister or Deputy Minister.

In addition, two other measures could assist in this area.

First, there needs to be more training for senior federal officials on Aboriginal consultation so that they better appreciate the scope of Canada's responsibilities when asked to make decisions. This was a concern of Aboriginal groups and federal officials for both substantive decision-making and decisions relating to consultation resources and travel. The duty to consult training has to date largely been taken by federal officials at the operational level which does not ensure that senior officials have a full understanding of the challenges and opportunities in this area.

Second, there needs to be more flexibility for federal officials to travel to Aboriginal communities or meet in-person in another location. This was a concern raised by numerous federal officials. In my view, there is no better way to build relationships than meeting with Aboriginal groups in their communities. This is an important sign of respect. It also enables a more fruitful dialogue and it allows people to better understand the circumstances in the community.

Travel in the federal government, like elsewhere, has been significantly restricted due to budget restraints. This will need to be re-examined if the federal government wants to build stronger relationships with Aboriginal groups and improve its approach to the duty to consult.

“...you don't build relationships in boardrooms; you build relationships on the land and in Aboriginal communities, when you have the courage and strength to meet them on their own terms.”

– Alan LaTourelle, former CEO of Parks Canada, *Promising Pathways, 2014*

RECOMMENDATIONS

- 22. Canada should ensure that senior federal officials receive appropriate training on the duty to consult and relationship building with Aboriginal groups that is tailored to the respective mandates and decision-making processes of their departments or agencies.**

Increasing Transparency and Improving Follow-up

Many of the concerns that Aboriginal groups raised regarding the meaningfulness of consultation related to a perceived lack of transparency and follow-up by federal officials. Many Aboriginal groups do not feel consultation is meaningful because they do not see their concerns reflected or addressed in the ultimate decision. They also raised concerns with the lack of transparency about what information is provided to decision-makers and what factors were considered in making certain decisions.

Aboriginal groups understandably want to ensure that decision-makers have an accurate summary of any outstanding concerns. The federal government has, in some cases, begun providing affected Aboriginal groups an opportunity to review and provide comments on the Crown consultation record or provide additional short submissions to the decision-maker. However, this is not being done consistently and sometimes it occurs too late in the process to discuss how inaccurate understandings of concerns can be addressed. There should be a consistent, transparent and



timely approach to this issue to ensure decision-makers have an accurate understanding of the views of Aboriginal groups.

In addition, many Aboriginal groups also expressed significant frustration that they put substantial time and expense into responding to consultation requests but rarely receive information on how their concerns were taken into account. They are informed of the final decision but often left guessing as to how their concerns were addressed or why specific concerns were not addressed. This is particularly problematic for Governor in Council decisions. This lack of information creates distrust and suspicion and understandably makes it difficult for Aboriginal groups to see the consultation as meaningful.

The 2011 Guidelines do contain a section on how to communicate decisions relating to accommodation but it appears that this guidance is not being followed in all instances, particularly in explaining why the accommodation options suggested by Aboriginal groups were not incorporated or addressed in another way. The feedback loop is time consuming but it is a critical component of meaningful consultation. Based on what I heard during this engagement, the lack of feedback appears to be one of the key issues undermining the perceived meaningfulness of consultation by the federal government. It needs to be given far greater emphasis in the new guidelines for federal officials and with resources and oversight necessary to support this work.

In some cases, there also needs to be greater overall transparency in decision-making. For example, Aboriginal groups frequently raised concerns with the lack of transparency in fisheries decisions. They feel that DFO decision-making on issues like food, social and ceremonial (“FSC”) fishing allocations takes place in a black-box. Many BC First Nations told me that they are not provided with adequate explanations as to how their annual FSC allocations are determined and why they have not increased since the early 1990s, despite substantial population increases in their communities (which in some cases have doubled). The lack of change in the numbers understandably raises questions about the meaningfulness of DFO’s consultations, particularly when specific conservation concerns are not adequately explained and there is no common understanding of how to even determine the food, social, and ceremonial fishing needs of a particular Aboriginal group.⁸⁷ It also leads Aboriginal groups to suspect that their priority of access for FSC fishing over commercial and recreational fisheries is not being respected.

DFO admittedly has a very challenging role. It must make complex resource management decisions based on imprecise science while balancing the views and interests of a wide range of fisheries interests. The department has also faced significant resource constraints. That said, Aboriginal groups are rights-holders and this needs to be appropriately reflected in DFO decision-making. More detailed explanations should be provided to explain how interests were considered and why specific concerns cannot be accommodated. This includes the process for determining FSC allocations under the Aboriginal Fisheries Strategy (“AFS”). The AFS should be comprehensively reviewed with Aboriginal groups and other affected stakeholders and consideration should be given to defining FSC as recommended by the Cohen Commission.

Finally, Aboriginal groups raised concerns about the lack of transparency after decisions are made, particularly in the environmental assessment process. In many cases, conditions are added to federal permits to address certain Aboriginal concerns. However, Aboriginal groups

⁸⁷ For a more detailed discussion of this issue, see the Report of the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, pp. 189-193, online: http://publications.gc.ca/collections/collection_2012/bcp-pco/CP32-93-2012-1-eng.pdf

reported that they do not generally receive information about whether the project is meeting its terms and conditions. There is also a general lack of awareness of how these issues are monitored, with the exception of CNSC. This is an issue of trust that can have negative ripple effects for future projects. It should be looked at more closely by federal regulators involved in permitting for resource development projects to ensure that information on the process and outcomes of monitoring is appropriately shared with affected Aboriginal groups. This work could also look at ways to enhance opportunities for Aboriginal groups to be involved in compliance monitoring, where possible, in order to build greater confidence in federal regulatory processes.

RECOMMENDATIONS

- 23. Canada should develop a consistent, transparent and timely approach to obtaining input from affected Aboriginal groups on the Crown consultation record before decisions are made and on reporting back to Aboriginal groups after decisions are made to explain how their concerns relating to adverse impacts on Aboriginal or treaty rights were taken into account in the consultation process.**

Improving Canada's Approach to Accommodation

During this engagement, concerns were frequently raised with the federal government's approach to accommodation. Many Aboriginal groups felt that their concerns were usually not adequately addressed through accommodation whereas federal officials and industry pointed to the lack of sufficient guidance on accommodation.

There is no stand-alone duty to accommodate but the effect of good faith consultation may reveal a duty to accommodate. The question of whether and what accommodation is required in a given case is very fact specific but the level of accommodation required will typically increase along the spectrum of the duty to consult. As such, the strength of the right asserted, the importance of the affected activity to the Aboriginal group, and the nature and severity of the impact will be important factors in assessing any accommodation required.

Accommodation at law involves taking measures to avoid, minimize or mitigate impacts on Aboriginal rights or interests. It requires "seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation".⁸⁸ This necessitates balancing Aboriginal concerns with other societal interests.⁸⁹ Absent a declaration of Aboriginal title, accommodation does not require that an agreement be reached or that all of the Aboriginal group's requests be granted.⁹⁰

"The effect of good faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim."

– McLachlin C.J., *Haida Nation v. British Columbia*, [2004] S.C.J. No. 70 (S.C.C.)

⁸⁸ *Haida* at para. 49; *Adam* at para. 88.

⁸⁹ *Haida* at para. 50.

⁹⁰ *Mikisew Cree* at para. 66.

To date, the case law has not required financial compensation for impacts to asserted but unproven rights and this matter has been treated somewhat inconsistently by the courts.⁹¹ However, regardless of whether financial compensation is treated as accommodation at law, many Aboriginal groups take the position that they should share in any prosperity derived from resources in their traditional territories and some proponents and provincial governments do provide direct and in-kind compensation or revenue sharing in certain circumstances.

Many Aboriginal groups contend that the federal government takes a too narrow view of accommodation and overly relies on proponents to provide accommodation. In their view, federal accommodation focuses almost exclusively on environmental mitigation measures through terms and conditions of licences or permits. They find this problematic because these mitigation measures may not eliminate the adverse effects at issue and cannot adequately address cumulative effects, economic or other accommodations for the loss of the use of land, or impacts to cultural and spiritual practices. Aboriginal groups want to see a much broader view of accommodation options including revenue sharing or financial compensation, shared decision-making, land protection measures, land transfers, and a no-development option where appropriate.



Several Aboriginal groups pointed to the restrictions of statutory mandates as a key obstacle to a more comprehensive approach to accommodation. This is notwithstanding the statement in the 2011 Guidelines that “the mandates of federal departments and agencies should not limit the options for accommodation available to Aboriginal groups”. Some federal officials acknowledged the limitations of government policy authorities in addressing issues like strong Aboriginal title assertions and the insufficient mechanisms for ensuring a whole of government approach to accommodation where issues go beyond the mandates of specific decision-makers.

Finally, some Aboriginal groups feel that the federal government uncritically accepts accommodation measures proposed by proponents and does not sufficiently discuss these measures with Aboriginal groups. A number of Aboriginal groups perceive that the federal environmental review process is set up for approval and feel that Canada needs to be more open to rejecting projects. The 2011 Guidelines indicate that saying no is one of the considerations under accommodation but Aboriginal groups want this option to be more clearly stated.

For its part, industry frequently raised concerns about the lack of clarity and direction from the federal government on accommodation. While there was a range of perspectives on the extent of industry’s role in accommodation, the vast majority wanted to see Canada take a more active role and provide greater clarity on what is expected in order to reduce project uncertainty. Industry representatives indicated that they are supportive of entering into impact benefit agreements with local Aboriginal communities where appropriate but they frequently find it challenging to determine whether and with whom they should enter into agreements, given overlapping claims and disagreements over the nature and extent of impacts. Some also find it

⁹¹ See *Ka’a’Gee Tu First Nation v. Canada (Attorney General)*, [2012] F.C.J. No. 327 (FC) at para. 121-123 (“Ka’a’Gee”) and *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. No. 444 (CA) at paras. 98, 100 & 104-5.

challenging to deal with the expectations of Aboriginal groups for financial forms of accommodation that go beyond reasonable compensation for the impacts at issue or when projects are in early conceptual and development stages and resources are limited, particularly in the case of junior mining companies.

Many industry representatives and federal officials indicated that they would like to see the development of a clearer framework for accommodation specifying the nature and degree of impacts that may require accommodation, how to determine what accommodation is appropriate for specific types of impacts, examples of typical accommodation measures,⁹² roles and responsibilities as between the Crown and industry on accommodation, the reciprocal obligations of Aboriginal groups, and how the federal government will determine if any accommodation requirements have been met.

There is a lack of sufficient guidance from the courts on accommodation but this should not prevent the federal government from proactively developing a more detailed policy framework on this issue. This framework should also be supplemented, where appropriate, by department and agency specific guidance on potential accommodation measures for commonly raised concerns, such as impacts to fish habitat.

This framework should give particular attention to issues like cumulative effects and impacts to strong Aboriginal title assertions. With respect to cumulative effects, consideration needs to be given to what can reasonably be addressed in the context of a federal project review rather than through more pro-active and inclusive land-use planning or other processes and monitoring mechanisms. In the case of strong Aboriginal title assertions, greater thinking is needed by the federal government on ways to preserve the Aboriginal interest pending resolution of these claims by considering the least intrusive impacts on asserted Aboriginal title lands, offset land protection measures, greater participation in decision-making, potential “economic accommodation” measures, and situations in which the appropriate accommodation may be denying an approval. At the same time, any framework for accommodation for asserted but unproven rights needs to remain connected with the purpose of the duty to consult. This duty was recognized by the courts in order “to ensure that land and the resources that are the subject of negotiations will not have been irremediably depleted or alienated by the time an agreement is reached”. It is not intended to provide Aboriginal groups with what they would be entitled to if they prove or settle their claims.⁹³

The framework should also provide greater guidance on consultation and accommodation in the context of overlapping Aboriginal title and rights claims, which is particularly challenging in BC. This is an area of significant confusion and uncertainty for proponents both with respect to the approach that should be taken and roles and responsibilities as between the Crown and industry proponents. Greater efforts are also needed by Canada and relevant provincial and territorial governments to help facilitate the resolution of these disputes.

It should be noted that the federal government did provide some additional general advice on accommodation in the Draft Proponent Advice, including a chart of eight example accommodation measures. While additional guidance in this area was welcome, this guidance was seen as insufficient because (i) it does not assist in determining the question of whether and to what degree accommodation is required (ii) the chart of examples is too limited and (iii) it does not address the issue of overlapping claims. There should be industry specific examples

⁹² For reference, the Nova Scotia *Policy and Guidelines: Consultation with the Mi'kmaq* includes a helpful chart of examples of possible accommodation measures and who is responsible for these measures.

⁹³ *Ka'a'Gee* at para. 123; *Adams Lake Indian Band v. British Columbia*, [2013] B.C.J. No. 1026 (SC) at para. 95-99.

(beyond pipelines) as well as additional examples of avoidance, mitigation or other accommodation measures such as habitat restoration and environmental monitoring, and measures to mitigate or offset impacts to cultural or spiritual practices.⁹⁴

While these measures have not been recognized as legally required accommodation, the guidance could also include examples of other forms of compensation or community benefit measures that may be considered and can be found in some private agreements between proponents and Aboriginal groups, such as revenue sharing, skills training, procurement opportunities, employment contracts, and measures to revitalize Aboriginal cultures and languages. These measures can provide very important benefits for Aboriginal communities and proponents and assist with gaining social licence and support for the project even if they are not legally required accommodation.

RECOMMENDATIONS

- 24. Canada should develop a more detailed policy framework on accommodation that identifies the nature and degree of impacts that may require accommodation, includes criteria to assess what is appropriate accommodation in the circumstances, provides general, sector and department specific accommodation examples (i.e. mining, pipeline, fisheries etc.), and outlines the roles and responsibilities of the Crown, proponents, and Aboriginal groups.**
- 25. Canada should clarify the federal government’s approach to accommodation for cumulative effects and impacts to Aboriginal title and cultural and spiritual practices, including setting out roles and responsibilities and ensuring that appropriate departments and agencies have the policy or statutory authorities to address these issues.**
- 26. Canada should provide greater guidance to proponents on how to approach consultation and accommodation where there are overlapping claims and clarify the respective roles and responsibilities of the federal Crown and proponents.**

Good Faith & Assessing the Adequacy of Consultation

Several Aboriginal groups felt that the 2011 Guidelines emphasize process over substance and that none of the three guidance documents place sufficient emphasis on the need for meaningful consultation.⁹⁵ This was a common concern with consultation on the ground as well. There is a perception that some federal officials come in with pre-conceived decisions, are not open to change, and just want to tick the box and move-on. In the words of one Aboriginal group, they “hear us but don’t listen”.

⁹⁴ The mitigation example of financing transportation to other similar sites where traditional practices may be continued should be removed or qualified in some way as this does not take into account preferred use and was not well received by Aboriginal groups. Location is important for Aboriginal groups as it is for non-Aboriginal people. See *Mikisew Cree* at para. 47.

⁹⁵ The 2011 Guidelines does not discuss “meaningful consultation” in detail until page 13 and the Draft Public Statement affirms Canada’s commitment to meaningful consultation and accommodation but does not fully explain what this means or what is expected. The Draft Proponent Guidance does not even discuss the concept of meaningful consultation although it appears to be targeted at promoting it.

There should be a greater emphasis in the new guidelines about the need to conduct consultation in good faith and to approach any discussions with an open-mind and a willingness to consider or make changes. The 2011 Guidelines speak about the need for federal officials to act in good faith but do not really explain what this means in practical terms for consultation or accommodation. The Draft Proponent Guidance does not even mention the term “good faith” although it does touch on related concepts. Aboriginal groups told me that a key determinant of success in both relationship building and consultation is the attitude that proponents and officials bring to the table. Good faith is an integral component of this – which requires listening, being open-minded, and willing to take ideas on board and change approaches where appropriate. Consultation is not just a process to exchange information and the new guidance needs to drive home that point.

There should also be efforts to ensure the guidance is not too process heavy. There is considerable discussion throughout the 2011 Guidelines about documentation and records management systems. While there needs to be guidance on this issue, the significant focus on documentation perpetuates the perception that consultation is simply a process to record rather than meaningfully address concerns. It also makes the document much longer than needed. This could be addressed in part by having separate guidance that is simply referred to as needed in the new guidance for federal officials and industry.

Finally, there is no consistent mechanism to ensure that the criteria of meaningful consultation are implemented through adequacy assessments before decisions are made. The 2011 Guidelines contains a list of questions for federal officials to evaluate the effectiveness of a consultation process after the fact but this evaluation is completed after the decision is made and the questions are not sufficiently focused on ensuring meaningful consultation.

RECOMMENDATIONS

- 27. Canada should provide guidance to federal officials that better explains the requirement of good faith in consultation and accommodation as well as how to assess the adequacy of consultation and any proposed accommodation before a Crown decision is made, which should include a set of specific factors or questions that are aligned with the criteria of meaningful consultation.**

Improving Guidance to Proponents

In *Haida*, the SCC recognized that the Crown may delegate procedural aspects of consultation to industry proponents for particular projects. However, the Court was also clear that the Crown has ultimate responsibility for meeting the duty to consult and cannot delegate the duty itself or the honour of the Crown.⁹⁶

“At all stages, good faith on both sides is required. The common thread on the Crown’s part must be ‘the intention of substantially addressing [Aboriginal] concerns’ as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation.”

– *McLachlin C.J., Haida Nation v. British Columbia*, [2004] S.C.J. No. 70 (S.C.C.)

⁹⁶ *Haida* at paras. 53.

The federal, provincial and territorial governments have tended to rely heavily on proponents to carry out consultation on resource development projects. Given the significant role industry frequently plays, both Aboriginal groups and industry have long called for greater guidance. This was the impetus for the federal government to develop the Draft Proponent Guidance.



There was a mixed reaction to this document. Aboriginal groups had largely negative views. Some felt that the guidance was rudimentary and a missed opportunity to be bold and inform proponents of some hard-truths.

Many others were concerned by what it did not contain, such the absence of any reference to Aboriginal title and the potential requirements of consent and justification. It was also felt that there was insufficient direction on capacity funding.

Some industry proponents thought the guidance was helpful and appreciated the additional clarity. Many others thought it fell short in a variety of ways. Some indicated that the guidance document only set out the bare legal minimum required and that in practice they would go well beyond this guidance in consulting and developing partnerships with Aboriginal groups. Others thought it was too general or contained too many expectations for industry without adequately explaining what exactly was required or providing advice on how to deal with specific challenges that industry routinely faces. Concerns were also raised with the lack of guidance or information on how Canada will determine the adequacy of consultation and that to some the document appeared to transfer even more responsibility to industry on issues like accommodation and identifying who needs to be consulted.

In my view, the Draft Proponent Guidance is not particularly helpful or enlightening. I have already addressed a number of areas where additional guidance is needed for proponents. The concerns below are additional issues with the Draft Proponent Guidance that I have not or will not address elsewhere in this report.

First, the document is too-high level and lacks the clear and practical guidance industry proponents need and want. They are looking for more than just a high-level overview of the duty to consult and a chronology of steps to follow. They want a better roadmap on how to navigate common challenges that arise in consultation (e.g. accommodation, capacity funding, and cumulative effects etc.) based on best practices and supplemented by process specific guidance. If this guidance is going to be included in the next version of the guidelines for federal officials, it should refer proponents to other relevant sections for clearer guidance on issues such as early engagement and relationship building, identifying and assessing adverse impacts, the nature of information that should be provided to Aboriginal groups at the outset of and during consultation, how to deal with capacity funding requests, what constitutes meaningful consultation and accommodation, how the federal government assesses the adequacy of consultation, and how to address issues like Aboriginal title and consent. If it is going to be a stand-alone document, these issues will need to be more fully addressed and the guidance should include overarching guiding principles.

In order to provide more practical guidance, it would also be helpful to include non-attributable “lessons learned” by proponents in key areas and what companies and their consultation practitioners have found to contribute to successful consultation and relationship building. It would also be of assistance to include a detailed “frequently asked questions” section to provide Canada’s position on issues commonly raised by proponents, like capacity funding requests. The BC Ministry of Aboriginal Relations and Reconciliation *Guide to Involving Proponents When*

Consulting First Nations provides a helpful Q&A for frequently raised issues and the federal government should consider something similar, although it would be beneficial to get the input of industry and to consider some of the helpful guidance that has been developed by certain industry associations.

Second, in cases where this has not already been done, federal departments and agencies should clarify what specific information they need proponents to obtain from Aboriginal groups, including particular questions they should consider asking. There should also be greater guidance on how to report information to the federal government. Federal officials indicated that industry proponents often request templates for issues tracking tables, consultation plans and reports and there is an inconsistent approach taken across the federal government on this. Templates should be developed or the federal government should list the specific information it wants to see in these documents to ensure that the information needed is collected and proponents are aware of what is expected.⁹⁷

Third, some industry participants were concerned that the Draft Proponent Guidance does not discuss the reciprocal obligations of Aboriginal groups to participate in consultation and does not contemplate situations in which Aboriginal groups refuse to engage with proponents. Particular concern was raised with the statement that Canada “expects industry to establish positive working relationships with Aboriginal groups and to maintain these relationships throughout the life cycle of their projects.” While this is the objective, some industry participants were concerned that this can be beyond their control if an Aboriginal group refuses to participate. This is a fair point. The language should be revised to reflect an expectation of best or all reasonable efforts and the guidance for proponents should either discuss the reciprocal obligations of Aboriginal groups to participate in consultation and not frustrate the process or refer to the section in the new guidelines for federal officials that does.⁹⁸

Fourth, Canada should clarify the statements that (i) “Corporate social responsibility measures, such as employment and social benefits, may not address adverse impacts on potential or established Aboriginal or treaty rights” and (ii) “robust consultation and accommodation activities carried out by proponents do not guarantee project approval”. With respect to the former, several industry participants felt that this was overly dismissive of measures that could help address and compensate for adverse impacts. These measures may not mitigate impacts but this does not mean that they cannot be used to compensate for unmitigated impacts. In regards to the second statement, some proponents felt that it created substantial uncertainty, particularly when coupled with the lack of guidance on what the federal government will consider for adequacy assessments. This is a needed disclaimer because consultation must consider the full-range of possible outcomes to be meaningful but it could be better worded to explain why this is the case and what the government will consider in making this assessment.⁹⁹

Fifth, several proponents and Aboriginal groups were concerned by the statement in the Draft Proponent Guidance that “If an agreement is struck between a proponent and an Aboriginal group that addresses adverse impacts, this information needs to be communicated to Canada.” Some perceived this as requiring full disclosure of any impact benefit agreements or similar agreements, including financial compensation. Based on my discussions with federal officials, I do not believe that this is the intent and it is instead targeted at ensuring that Canada is aware of any additional impact mitigation or monitoring measures that are not included in the

⁹⁷ See, for example, BC Environmental Assessment Office, *Guide to Involving Proponents When Consulting First Nations in the Environmental Assessment Process*, December 2013, pp. 8 & 16-20.

⁹⁸ *Nunatukavut* at para. 300; *Long Plain* at para. 158; *Halfway River* at para. 161.

⁹⁹ See *West Moberly* at para. 149.

permitting as well as ongoing consultation mechanisms. This should be clarified, with appropriate regard to maintaining the confidentiality of any commercially sensitive terms in agreements between Aboriginal groups and industry proponents.¹⁰⁰

RECOMMENDATIONS

- 28. Canada should develop more detailed and practical overarching guidance for industry on consultation and accommodation, which includes lessons learned by proponents and governments in key areas and answers to questions that proponents commonly raise with the federal government.**
- 29. Federal departments and agencies that rely on proponents in any way for consultation should clarify what specific information proponents should obtain in consultation, what information should be reported to the federal government on their consultation activities, and what specific accommodation information that the federal government would like to receive from proponents relating to any agreements that they have with Aboriginal groups, with appropriate regard to maintaining the confidentiality of any commercially sensitive terms.**

¹⁰⁰ Although there are compelling reasons to maintain confidentiality over this information, including the potential to stifle productive negotiations, this confidentiality is not without cost or consequence. The absence of this information can create a challenging environment both for proponents and Aboriginal groups of widely varying degrees of capacity in determining an appropriate negotiated outcome.

IV. ENHANCING THE CAPACITY OF ABORIGINAL GROUPS

The capacity of Aboriginal groups to engage in consultation was a concern raised in virtually every meeting, whether it was with Aboriginal groups, industry, or federal and provincial officials. Many Aboriginal groups feel inundated with consultation requests and believe that they lack the capacity to respond meaningfully. To provide some perspective, some Aboriginal groups reported that they receive hundreds of consultation referrals a year. The largest portion of these requests are generally for decisions by the provincial and territorial governments.

Aboriginal groups vary widely in their capacity. Some have no dedicated staff for consultation while others have entire teams with environmental and archaeological expertise and additional support from external consultants. Regardless of the existing level of capacity, a number of resource constraints were frequently highlighted including:

- A lack of sufficient human resources to triage and prioritize consultation requests;
- A lack of sufficient technical expertise or skills training to review and respond to complex consultation requests, which for environmental assessments can include thousands of pages of technical information and multiple iterations;
- A lack of baseline information and human resources necessary to determine where asserted or established rights are currently or were traditionally exercised in order to assess impacts; and
- A lack of human resources to report back to members, particularly in the situation of aggregates.

Aboriginal groups feel that they should not be expected to participate in consultation initiated by the Crown and/or industry on their own dime and that they should be provided sufficient capacity funding by the federal government and industry to support the work required to respond to consultation requests.

Some industry proponents acknowledge that capacity funding is a crucial ingredient for meaningful consultation. Others do not provide such funding as they do not think it is their role or responsibility or they do not believe it is necessary in the particular circumstances. Some industry participants reported that some of the capacity funding requests they have received are excessive, out of line with what work is reasonably required in the particular circumstances, and that there is a lack of transparency around how the money is being spent. There was also some concern among both industry and federal officials that capacity funding is not being used effectively to build the internal capacity of Aboriginal communities but instead going to support a cottage industry of lawyers and consultants.

“It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.”

- *Vickers J., Tsilhqot'in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (BC SC)

Aboriginal capacity is an important issue that needs to be better addressed but the solution is multi-faceted and is not simply about providing more money. It also requires reducing unnecessary demands on Aboriginal capacity, enhancing in-kind assistance and training, and providing greater guidance on capacity support. I will address each issue in turn.

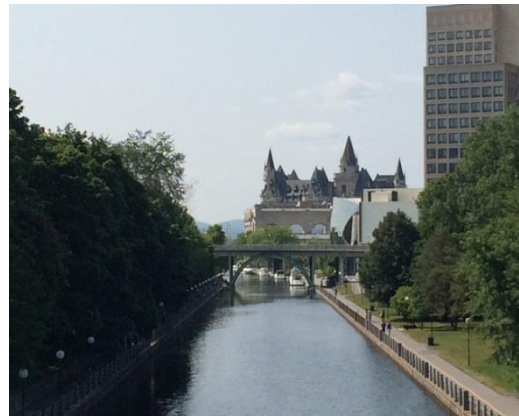
Decreasing Capacity Demands on Aboriginal Groups

Both Aboriginal and industry participants suggested that one of the ways that Canada could help address Aboriginal capacity is by reducing the unnecessary duplication of effort through improved information sharing within the federal government, enhanced federal and intergovernmental coordination on related issues, and taking a more strategic and efficient approach to areas of frequent consultation activity.

INCREASING INTERNAL INFORMATION SHARING AND COORDINATION

Some Aboriginal groups expressed frustration that they repeatedly have to provide the same information to different departments, which is an unnecessary strain on their capacity. Federal officials are similarly frustrated that they lack information that could assist them and that they are duplicating previous work or not sufficiently coordinating consultation with other departments.

Currently, there is no easy way for federal officials to determine what other issues the federal government has or is consulting particular Aboriginal groups on or what concerns the group has raised in the past. This is because the federal government does not centrally track or record information gathered in consultations. Information is typically recorded in text-based documents or spreadsheets and not shared between departments and agencies unless required. There is currently no interoperability between the various Aboriginal consultation files of federal departments and agencies. This lack of information not only requires duplication of effort but also reduces the government's ability to identify ways to improve overall efficiency of consultation and reduce capacity pressures on Aboriginal groups.



During the engagement, a federal official told me about a proposal he had for a central information system for all consultation activities by federal departments and agencies. I think this is a good idea and should be pursued. However, the design and implementation will need to be carefully thought through to ensure that it is not duplicative, cumbersome, or onerous and it is limited to high-level information gathered in formal consultation. It should not include all discussions a department or agency has ever had with Aboriginal groups or every phone call and letter in a consultation process. It should be designed to enable federal officials' to quickly inform themselves of prior and ongoing consultation activity with a particular Aboriginal group and concerns that they have raised in the past vis-à-vis impacts to asserted or established Aboriginal or treaty rights. The utility of this system could likely be enhanced if it were interoperable with ATRIS for federal officials.

RECOMMENDATIONS

- 30. Canada should implement a high-level central information management system for consultation activities of the federal government. This system should, at a minimum, contain all of the issues that a particular Aboriginal group has been or is being consulted on by federal departments and agencies, concerns that they raised in previous consultations, previous capacity funding, issues to flag for future consultation, and a contact name in the federal government for each previous consultation.**

BUILDING CONFIDENCE AND TAKING MORE STRATEGIC APPROACHES

In addition to increased information-sharing, the federal government can also help decrease Aboriginal capacity pressures by building confidence in federal regulatory processes and taking more strategic approaches to consultation.

In some cases, Aboriginal groups are essentially duplicating government environmental review processes due to a lack of trust in or inaccurate information about federal review processes. This leads to significant requests for capacity funding from proponents in particular and in some cases for work that goes beyond the impacts relevant for the duty to consult. While some independent expert review may be required to assess potential concerns, the scope and cost of this review could likely be reduced if Aboriginal groups had greater trust in federal regulatory processes and more involvement at the outset in discussing the potential scope of studies and assessments. Some of these concerns can hopefully be addressed through the federal government's review of CEEA 2012 and the NEB Act. This could also be supplemented by measures to increase awareness and answer questions about federal regulatory processes. Several Aboriginal communities spoke positively about federal departments that came into their communities and explained specific regulatory processes. This can help dispel myths and build confidence in these processes. Departments and agencies with environmental regulatory review responsibilities should be provided the resources to do more of this work.



In addition, the federal government could also decrease Aboriginal capacity pressures by reducing duplication and the number of unnecessary separate processes for consultation. In the context of resource development, this could be done in a number of ways, such as consulting on a suite of permits at the same time rather than on a permit by permit basis after an environmental assessment is completed. Consideration could also be given to discussing multiple proposed projects in the same meeting in areas of significant resource development activity or back-to-back meetings where appropriate and agreed to by the Aboriginal group.

Greater intergovernmental coordination on consultation for projects that are jointly regulated could also assist with reducing capacity pressures with regard to resource development issues. This includes increasing coordination of consultation and accommodation activities to the extent possible, including through joint meetings, and identifying ways to better align and simplify these processes. It also involves greater information sharing to reduce the need for Aboriginal groups to repeat the same information to multiple levels of government.

INAC has been negotiating Memoranda of Understanding with provinces to improve intergovernmental coordination, but only one agreement has been signed thus far (with Nova Scotia). INAC should prioritize finalizing these agreements and work with each of the provinces and territories to identify 3-5 priorities aimed at improving coordination and information-sharing in each jurisdiction, with input from affected Aboriginal groups and industry associations.¹⁰¹

¹⁰¹ The current MOU template should be enhanced to ensure greater coordination on Aboriginal capacity building, strengthen accountability measures for the joint federal-provincial or federal-territorial working groups to ensure progress in meeting the MOU's objectives, and establish sub-committees with Aboriginal and industry representatives in each province and territory to provide advice on better aligning approaches to consultation and accommodation and reducing unnecessary duplication.

Outside the resource development context, capacity pressures could be reduced by taking a more strategic and coordinated approach to consultation on resource management issues. Aboriginal groups raised examples of federal departments and agencies having several separate consultation processes to discuss interrelated resource management issues, such as four separate processes related to a specific fish species. Some Aboriginal groups also said they are inundated with individual consultation requests or notifications of pending decisions in certain areas like Species at Risk and find it difficult to prioritize and respond in a timely way.

Several Aboriginal groups suggested that it would be more efficient to combine related processes and have higher level, strategic tables to discuss multiple upcoming decisions at once with the relevant department experts present to answer any questions. Strategic, higher level tables or other mechanisms to discuss similar or related issues at the same time make sense for both parties in areas of frequent consultation and can help to ensure issues are addressed in a more holistic manner. BC has had some success in this area and departments like DFO should use these mechanisms where possible, provided that they are consulting with rights-holding groups or organizations duly authorized to speak on their behalf.

In addition, the federal government can support Aboriginal capacity building and better decision-making by incentivizing Aboriginal groups to engage in joint consultation on certain resource management issues where appropriate. Aggregation makes particular sense for fisheries management decisions relating to migratory species, like salmon. For example, there are over 150 BC First Nations that rely on Fraser River salmon and it does not make sense nor does DFO have the resources to consult and provide capacity funding to each individual community for discussions on the management of Fraser River salmon. There have been several joint committees, fora, and Aboriginal organizations that DFO has worked with and supported with capacity funding but, to date, no Aboriginal organization has had the authority to participate in consultation on fisheries issues on behalf of BC First Nations.

The Fraser River Aboriginal Fisheries Secretariat has established a Fraser Salmon Management Council which is mandated to negotiate a Fraser Salmon management agreement with DFO. It currently has 62 First Nations which have authorized it to negotiate on its behalf. This is a win-win development that can enhance Aboriginal capacity by pooling resources, encourage more meaningful consultation, and help to address the resource challenges at DFO. DFO acknowledges that this is a significant and positive development. DFO should look for ways to support this initiative and replicate it on other fisheries management issues, where possible.

RECOMMENDATIONS

- 31. Federal departments and agencies should work to reduce capacity demands on Aboriginal communities, such as consolidating consultations on related issues, consulting on a suite of permits for a project at the same time, enhancing coordination with the provinces and territories, building confidence in federal regulatory processes, and establishing strategic high-level tables in areas of frequent consultation.**
- 32. Indigenous and Northern Affairs Canada should enter into MOUs on consultation and accommodation with all provinces and territories on a priority basis and identify concrete joint priorities with each province and territory aimed at improving coordination and information-sharing in each jurisdiction supported by action plans and accountability measures to ensure meaningful progress.**

Increasing Training and In-Kind Capacity

Canada can also assist in building Aboriginal capacity through greater skills training, increasing access to federal experts, and enhancing knowledge about resource development issues.

Skills training is needed to help build up the in-house capacity of Aboriginal groups for consultation, particularly technical expertise for reviewing and responding to information provided in environmental assessments. The federal government should work with Aboriginal groups, the provinces, and territories to identify skills gaps in this area and develop or support targeted skills-training and apprenticeship initiatives. Greater access to experts within the federal government to answer questions could also assist with addressing capacity gaps.

In addition, there should be increased public education and sharing of information with Aboriginal groups about energy, mining and other resource development issues in Canada. Aboriginal communities that are potentially impacted by resource development need reliable and unbiased information to understand the potential impacts and risks of the various methods of exploration, development, and transport of resources in order to make informed decisions.

In his report, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*, Mr. Eyford recommended that:

“Canada should promote a principled dialogue about resource development with Aboriginal communities in Alberta and British Columbia. This can be accomplished, in conjunction with provincial and local governments and industry, by convening conferences, workshops, and community forums to improve knowledge about the energy sector and major projects.”

Mr. Eyford’s recommendation was limited to Alberta and British Columbia because his mandate was focused on west coast resource development. In my view, this knowledge sharing is needed beyond BC and Alberta and Canada should work with the provinces, territories, and industry to promote similar initiatives for Aboriginal groups across the country that are impacted by resource development. These initiatives could also promote a dialogue about the ways Aboriginal traditional knowledge and participation can enhance environmental monitoring and stewardship for projects and best practices that can be drawn from positive experiences that Aboriginal groups have had with resource development.

In addition, it would also be beneficial for consultation if Canada continued to build on initiatives targeted at enhancing the capacity of Aboriginal communities to participate in resource development, such as the Community Readiness Initiative, the Aboriginal Forestry Initiative and the ongoing work of MPMO West.

RECOMMENDATIONS

- 33. Canada should work with provinces, territories and Aboriginal groups to identify consultation skills gaps in Aboriginal communities and develop or support targeted skills-training and apprenticeship activities aimed at increasing local capacity for consultation as well as improve access to federal government expertise.**

- 34. Canada should work with the provinces, territories, and industry to promote a principled dialogue about resource development with Aboriginal communities. This dialogue should be aimed at improving knowledge about the energy, mining and other resource sectors and how Aboriginal traditional knowledge and participation can enhance environmental monitoring and stewardship for projects.**

Providing Clearer Guidance on Capacity Support

In addition to reducing capacity pressures on Aboriginal groups, greater guidance is needed for both federal officials and industry on capacity support.

Many Aboriginal groups take the position that capacity funding is a legal requirement for meaningful consultation and that there should be clear direction to industry and federal officials that capacity funding must be provided in all cases. The law on capacity funding is not quite as definitive. The need for capacity funding has been considered on a case-by-case basis and, to date, there has been no finding that the Crown or proponents have a legal obligation to provide capacity funding whenever they are consulting Aboriginal groups. However, some lower courts have linked capacity funding to an Aboriginal group's ability to participate meaningfully in consultation.¹⁰² In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, Justice Smith held that "The issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'".¹⁰³ In that case, the court imposed a consultation protocol that included an obligation for Ontario to cover the First Nation's "reasonable costs" although the parties in this case were disputing the quantum of capacity funding required and not whether capacity funding would be provided at all.



In other cases, the courts have suggested that capacity funding should be provided based on the complexity of the matter or that there should have been other accommodations to address capacity such as changing deadlines or making Crown resources available to the particular Aboriginal group.¹⁰⁴ In other instances, the courts have commented favourably about the provision of capacity funding or other in-kind support, such as making Crown experts available for questions. However, there have also been recent cases where no capacity funding was provided at a certain stage or at all and this did not render the consultation deficient.¹⁰⁵

The 2011 Guidelines indicate that departments and agencies must assess requests for capacity funding and determine whether support should be provided and to what extent. However, it

¹⁰² See for example *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 221 (ON SCJ) at para. 27 ("*Platinex*"); *Moulton Contracting Ltd. v. British Columbia*, [2013] BCJ No. 2818 (BC SC) (reversed on other grounds) at paras. 292 & 296.

¹⁰³ *Platinex* at para. 27. Justice Smith in this decision found in this case that there was insufficient material before the court to make an informed decision as to what level of funding would be reasonable. However, Justice Smith imposed a consultation protocol which included a provision that "Ontario will cover KI's reasonable costs in respect of the herein consultation, which reasonable costs shall be based upon the timetables and workplan or plans as agreed to by the parties...." KI had rejected Ontario's proposal of \$150,000 as inadequate and sought over \$600,000. Cited with approval in *Enge v. Northwest Territories*, [2013] NWTSC 33 (NWT SC) (on appeal)

¹⁰⁴ *Cook v. British Columbia*, [2007] B.C.J. No 2556 (SC) at para. 194 and *Moulton Contracting Ltd. V. British Columbia*, [2013] B.C.J. No. 2818 (BC SC) (Reversed on other grounds) at paras. 292 & 296.

¹⁰⁵ *Adams Lake* at paras. 96-101 and *Nunatukavut* at para. 214.

provides no guidance on the factors to consider in determining whether to provide capacity funding or the amount that should be provided in a given situation.¹⁰⁶ The Draft Proponent Guidance offers even less information and simply notes that proponents should maintain a record of capacity assistance provided as “this information supports the assessment of adequacy of a consultation process.”

Provincial consultation guidelines and policies vary in the extent to which they encourage or require the provision of capacity funding. While all provinces provide some level of capacity funding, only Manitoba and Newfoundland and Labrador have policies directing officials or industry to ensure that Aboriginal groups have sufficient resources for consultation. Manitoba requires departments to provide “adequate resources to ensure meaningful consultation”¹⁰⁷ while Newfoundland and Labrador stipulates that industry must provide “reasonably necessary capacity funding”.¹⁰⁸

I agree that the federal government should provide clearer guidance in this area. However, I do not agree or recommend that direct funding from the federal government or industry be required in all instances. The need for capacity funding should be assessed based on the particular circumstances. Capacity funding may not be necessary given the subject matter of the Crown decision or action, the level of consultation required, the potential for impacts on asserted or established Aboriginal or treaty rights, other capacity funding available or existing applicable assessments, or other in-kind capacity support. Canada should, however, require federal officials to consider in all instances at the outset of consultation whether there are any capacity barriers that need to be addressed to ensure meaningful consultation and provide a list of factors for federal officials to consider when determining if and through what means capacity support should be provided. This overarching guidance can be supplemented with department and agency specific guidance.

With respect to industry, there should be improved guidance that encourages industry proponents to discuss capacity needs with affected Aboriginal groups and to report any efforts made or offers to address capacity issues (in-kind or financial) to the federal government. This guidance should also indicate that Canada will consider whether there were any capacity barriers to meaningful consultation when determining the adequacy of consultation and the efforts or reasonable offers made to address these barriers. This will need to take into account the reciprocal obligations of Aboriginal groups not to impose unreasonable requirements in consultation, which should be highlighted in any guidance on capacity funding. Capacity funding requests need to be based on reasonable work plans designed to understand and

¹⁰⁶ The guidance produced by some federal departments and agencies goes further than the 2011 Guidelines on capacity funding. For example, Environment and Climate Canada’s *Policy on Public Participation and Aboriginal Consultation* states that “many Aboriginal peoples will require additional resources to participate meaningfully in consultation processes. Managers should work with interested and affected Aboriginal peoples to identify constraints that would prevent full and effective participation, and to determine how these constraints can be most reasonably addressed...” Parks Canada’s *Promising Pathways* also states that it is “important to ensure partnerships are properly resourced” and recognize the time, effort and associated costs of Aboriginal participation.

¹⁰⁷ Government of Manitoba, *Interim Provincial Policy for Crown Consultations with First Nations, Metis Communities and Other Aboriginal Communities*, p. 4; Government of Manitoba, *Crown-Aboriginal Consultation Participation Fund – Community Guide*, pp. 1 & 3. Although it does not require industry to provide capacity funding, Saskatchewan’s guidance indicates that it will consider capacity support from proponents (including in-kind assistance) in assessing the adequacy of consultation. In addition, Alberta has also enacted the Aboriginal Consultation Levy Act which would impose a capacity levy on industry to be redistributed to First Nations in that province. However, the Notley government has committed to repealing this legislation due to the lack of consultation prior to its implementation.

¹⁰⁸ Government of Newfoundland and Labrador, *Aboriginal Consultation Policy on Land and Resource Development Decisions*, April 2013.

assess impacts of the particular Crown decision at issue on asserted or established Aboriginal or treaty rights and formulate a response. There may be multiple ways to do this and flexibility is needed on all sides to find practical and cost-effective solutions.

Some industry representatives raised concerns about linking decisions about the adequacy of consultation to capacity funding. They felt that adequacy should be solely decided based on whether the Crown and proponents' have listened to concerns and appropriately addressed adverse impacts on asserted or established Aboriginal or treaty rights. This should continue to be the major focus of the adequacy analysis but meaningfulness also depends on the ability of Aboriginal groups to participate in the process. Again, achieving a meaningful process of consultation will not always require direct funding or providing the specific amount of capacity funding requested by an Aboriginal group when it is not reasonable for the scope of work required, the complexity of the matter, or the degree of impacts at issue. Discussing what specific capacity barriers exist and the work that Aboriginal groups want to do to assess impacts may also reveal other measures to address this such as making experts available to answer technical questions, extending timelines, providing additional project information in a non-technical manner, retaining joint experts, funding traditional land use studies, providing training and/or supporting initiatives that increase mining or energy literacy of a community.

RECOMMENDATIONS

- 35. Canada should direct federal officials to consider at the outset of consultation whether capacity support (financial or in-kind) is necessary to ensure meaningful consultation and to consider capacity when determining the adequacy of consultation. Canada should also provide criteria to consider in determining whether to provide capacity assistance, the nature of that assistance as well as a consistent approach to determining the quantum of any financial assistance.**
- 36. Canada should provide additional guidance to industry on the reasons for and benefits of providing capacity support, the range of support that can be provided, and factors to consider and information to request in order to determine an appropriate quantum of any financial assistance. This guidance should also encourage proponents to have early discussions with Aboriginal groups to determine whether capacity support is needed, outline the reciprocal obligations of Aboriginal groups in making capacity requests, and indicate that any capacity barriers and reasonable efforts or offers to address these barriers will be considered in assessing the adequacy of consultation.**

Enhancing Capacity Funding

In addition to guidance, the federal government should enhance its current approach to capacity funding. Aboriginal groups raised a number of issues with respect to the level and nature of capacity funding provided by Canada. By way of background, the federal government currently provides limited capacity funding through a number of mechanisms.

First, the federal government provides participant funding to Aboriginal groups for major projects being reviewed by CEAA,¹⁰⁹ CNSC,¹¹⁰ and the NEB.¹¹¹ For example, depending on the depth of

¹⁰⁹ Canadian Environmental Assessment Agency, *Participant Funding Program – National Program Guidelines*, 2015, online: http://www.ceaa.gc.ca/Content/9/7/7/9772442E-9A6B-4302-968E-3946E19700D0/National_Program_Guidelines.pdf

consultation required, CEAA provides potentially impacted Aboriginal groups up to \$67,500 in participant funding per group for a comprehensive review EA and up to \$95,600 per group for an EA requiring a review panel hearing.

Second, INAC provides capacity funding to aggregates of Aboriginal groups that have entered into consultation protocols with the federal government, several of which are trilateral and include a larger provincial capacity funding contribution due to greater provincial consultation activity.¹¹²

Third, some departments provide capacity funding to Aboriginal groups or organizations to support particular consultations or enhance Aboriginal capacity to participate in resource management discussions. For example, DFO and ECCC jointly fund the Aboriginal Fund for Species at Risk which supports Aboriginal organizations and communities across Canada in improving their ability to participate in the protection and recovery of species at risk, preventing species from becoming a conservation concern, and recovering and protecting important aquatic and terrestrial habitat on Aboriginal lands.¹¹³ In addition, DFO provides funding through the Aboriginal Aquatic Resource and Oceans Management program to help Aboriginal fisheries organizations or other aggregates of Aboriginal groups participate in decision-making processes used for aquatic resource and oceans management. DFO also provides funding to support the work of the Yukon Salmon Sub-Committee, an advisory committee for salmon management in the Yukon established in the 11 Yukon Final Agreements.



There were several concerns raised with respect to this funding.

First, Aboriginal groups repeatedly stated that their capacity needs cannot be met with one-off project funding and that they need core capacity funding on a recurrent and predictable basis. Without predictable core funding, they often do not have the resources to hire staff devoted to consultation.

Second, there were numerous concerns regarding participant funding through CEAA, the NEB and CNSC. The amounts provided by all three were seen as insufficient and some Aboriginal groups reported that the CEAA funding process is overly complicated and the reporting requirements too onerous for the amounts at issue. Concerns were also raised that Aboriginal groups frequently do not receive explanations as to why capacity requests were denied.

¹¹⁰ Canadian Nuclear Safety Commission, *Participant Funding Program Guide*, February 2011, online: http://nuclearsafety.gc.ca/eng/pdfs/participant-funding-program/Participant-Funding-Program-Guide_e.pdf

¹¹¹ National Energy Board, *Participant Funding Program Guide*, December 2014, online: <https://www.neb-one.gc.ca/prtcpn/hrng/pfp/prgrmgd-eng.html>

¹¹² Canada currently has consultation protocols with aggregates of First Nations in Nova Scotia, New Brunswick, Prince Edward Island as well as the Metis Nation of Ontario and the Algonquins of Ontario. See <https://www.aadnc-aandc.gc.ca/eng/1331839216095/1331839363228>

¹¹³ ECCC also provides funding to Aboriginal organizations (and other non-Aboriginal community and non-profit organizations) through programs like the Ecoaction Community Funding Program and the Habitat Stewardship Program. The Ecoaction Community Funding Program provides funding for projects that will protect, rehabilitate or enhance the natural environment. The Habitat Stewardship Program provides funding for projects that conserve and protect species at risk and their habitats or prevent species from becoming a conservation concern.

Third, there were several concerns with the capacity funding provided through consultation protocols. Organizations with consultation protocols stated that the level of funding is inadequate to support the internal consultation needed with member First Nations. Other Aboriginal groups without protocols felt it was unfair that capacity funding was only available to aggregates or that they had been denied funding because they did not have sufficient federal consultation activity.

Fourth, Aboriginal groups stated that departments like DFO, Transport Canada and ECCC regularly consult but frequently do not provide capacity funding. In some instances, Aboriginal groups have also been informed by certain departments that they could not provide capacity funding because they did not have the funding authority to do so, which understandably was not well-received.

As noted above, DFO does provide capacity building funding through several different programs but this funding is limited and DFO and other departments do not provide capacity funding for all of their consultations with Aboriginal groups. Moreover, DFO's capacity funding is also largely provided to Aboriginal fisheries organizations or aggregates of Aboriginal groups based on watersheds rather than individual Aboriginal groups. While this approach to consultation makes sense from a fisheries management standpoint, these organizations have not in the past been authorized to speak for rights-holders for consultation as discussed above. This has resulted in individual First Nations taking the position that they have not been consulted or provided capacity funding by DFO, notwithstanding the funding that DFO provides to Aboriginal fisheries organizations in their respective regions. This will continue to be a challenge for fisheries consultations unless it is resolved where possible through discussions between DFO, Aboriginal fisheries organizations, and Aboriginal groups in particular regions.

With respect to project funding, Canada should look for ways to streamline the application and reporting process for participant funding through the NEB, CNSC and CEAA. It should also ensure that participant funding sufficiently incentivizes aggregation, including through the quantum available and/or the mechanism through which it is provided. There should also be a consistent approach taken across federal departments with respect to project based capacity funding for consultations relating to resource management and other strategic, high-level decisions.

With respect to core funding, the federal government can play a leadership role by working with provinces and territories to ensure that all Aboriginal groups have some core capacity consultation funding and by contributing core funding where there is a need and a certain threshold of federal consultation activity. The federal government is only part of the solution on this issue. Provinces, territories and industry also have significant roles to play. Of the government actors, provinces and territories should have the largest responsibility in this area because they generally have more frequent consultation activity with Aboriginal groups in comparison to the federal government. Given the amount of this activity, all provinces and territories (with the exception of Nunavut) should provide core capacity funding to Aboriginal groups or aggregates within their respective jurisdictions. Several provinces are now doing this, such as Alberta, Quebec, Ontario, New Brunswick and Nova Scotia, but other jurisdictions provide more ad hoc capacity funding through project funding and/or consultation protocols.

Any federal core capacity funding will need to be worked out by jurisdiction, having regard to the specific regional needs, the extent of federal consultation activity, and other capacity funding sources available to the Aboriginal group. One of the obstacles to addressing this is that the federal government does not have the information needed to make appropriate core capacity funding decisions. As discussed above, there is no central database tracking all consultations by the federal government or the capacity funding (if any) that it has provided to Aboriginal

communities. Similarly, Canada does not have complete information on what other capacity funding communities are receiving from other sources like industry. This information is needed in order to identify capacity needs and how the federal government can assist.

Moreover, any discussion about increased federal capacity funding cannot be divorced from the significant competing funding pressures that Canada faces for other Aboriginal priorities, such as education, child welfare services, health-care, and infrastructure. Each dollar invested in capacity funding is a dollar that could be invested in other measures to narrow the unacceptable gaps in socio-economic indicators between Aboriginal and non-Aboriginal Canadians.

In reality, the federal government simply does not have the resources to sufficiently build up the internal consultation capacity of each Aboriginal community in Canada given the sheer number of Aboriginal communities and these other priorities that need investment. It also does not make practical sense to do so. Many of these Aboriginal communities are very small (i.e. less than 300 people) and part of larger nations that were fragmented by Canada for a variety of reasons. For example, there are over 617 *Indian Act* bands comprising just over 50 original nations or cultural groups in Canada.¹¹⁴ While all First Nations communities need some basic capacity support, it does not make sense for the federal government to provide substantial funding to over 617 communities to support a team of consultation staff with a range of expertise. The same is true for Métis local councils, which are often even smaller.

Given this reality, Aboriginal communities that are part of larger nations should strongly consider pooling consultation resources with communities within the same nation, region, or historic treaty through consultation protocols with the federal government. Individual communities can still make decisions on issues that directly affect their asserted or established rights but they would have access to a pool of shared resources, including federal capacity funding, to assist with certain common functions like triaging and prioritizing consultation requests and assessing common impacts. This would allow federal capacity funding to make a more meaningful difference and enhance the capacity of all parties by simplifying the process. Even in just the First Nations context, the difference in amounts when you divide a total by 617 instead of 50 or 150 is staggering. This cooperative approach is being taken, for example, by Canada with the Mik'maq in Nova Scotia and by the BC government with the Sto:lo. The federal government should be looking at ways to incentivize this type of aggregation where possible across Canada.

RECOMMENDATIONS

- 37. Canada should work with the provinces and territories to incentivize aggregation of Aboriginal groups for consultation and to ensure that all Aboriginal groups receive core capacity funding for consultation and that Canada contributes core capacity funding where there is a need and a certain threshold of federal consultation activity.**
- 38. Canada should ensure that all departments and agencies that engage in consultation with Aboriginal groups have the authority to flow capacity funding and identify ways to streamline the application and reporting processes for federal participant funding and incentivize aggregation for this funding.**

¹¹⁴ Indigenous and Northern Affairs Canada, *First Nations*: <https://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795>

V. CONSENT AND JUSTIFICATION

Consent

CURRENT CANADIAN LAW

Many Aboriginal groups felt that a key deficiency of all three guidance documents was the lack of any discussion about when consent is required, particularly in light of the *Tsilhqot'in* decision. The 2011 Guidelines (which predate *Tsilhqot'in*) refer to consent only once in a brief section on UNDRIP. The other two draft documents are silent on the issue.

Aboriginal groups and a number of federal officials felt that there should be guidance on this issue. The SCC's decision in *Tsilhqot'in* has created significant expectations amongst Aboriginal groups and there are differing interpretations of the decision. While the decision clearly states that consent is required once Aboriginal title is established, some Aboriginal participants suggested to me that the decision states that consent is also required prior to the establishment of Aboriginal title and that the guidance documents need to reflect this. This is based largely on the following two passages of the decision:

92. Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if the continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

....

97. I add this. Government and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

While these passages encourage obtaining consent as a practical means of managing risk and avoiding challenges by Aboriginal groups, they do not in my view legally require it prior to the establishment of Aboriginal title. This interpretation is supported by the SCC's discussion of what is owed to Aboriginal groups prior to the declaration of Aboriginal title in general and what was owed to the *Tsilhqot'in* in particular:

“The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982* “

– *McLachlin C.J., Tsilhqot'in Nation v. British Columbia*, [2014] S.C.C. 44 (SCC)

89. Prior to the establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed....

.....

93. Prior to the declaration of Aboriginal title (for the Tsilhqot'in), the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong prima facie claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

Thus, even in the specific case of the Tsilhqot'in, the SCC did not find that consent was required prior to the establishment of Aboriginal title. That said, the SCC did note the risk of the Crown having to revisit a decision if consent is not obtained, Aboriginal title is subsequently established, and the continuation of the project would be unjustifiably infringing. It also held that where a claim is particularly strong – e.g. shortly before a court declaration of title – appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.¹¹⁵

Given these situations in which consent may be legally or practically required, there should be greater guidance on when consent is required and how best to achieve it. This will require the federal government to clarify how it interprets the *Tsilhqot'in* decision and whether it is going to require consent in any additional circumstances beyond established Aboriginal title and unjustifiable infringements of established Aboriginal and treaty rights and, if so, which ones. This is even more pressing given the new federal government's commitment to implement UNDRIP, which will be discussed in the next section.

In reality, the building blocks of consent and meaningful consultation are very similar. They share the same long road of early engagement and relationship building before a fork at the very end of the road. Ideally, a meaningful process of consultation could achieve consent before the parties get to the fork in the road and avoid the need to part ways.

Expectations and positional statements used on both sides can impede this journey and dialogue. Positional statements on requiring consent in all situations or Aboriginal groups not having a veto can become irrelevant through a meaningful process that seeks to substantially address Aboriginal concerns and obtain consent if reasonably possible.

RECOMMENDATIONS

39. Canada should clarify in the new guidance for federal officials and industry when it is necessary to obtain the consent of affected Aboriginal groups, from whom consent must be obtained, as well as provide best practices for achieving consent.

¹¹⁵ *Tsilhqot'in* at para. 91.

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Throughout the engagement, Aboriginal groups frequently raised UNDRIP and specifically the need to obtain their free, prior and informed consent for any decisions that may impact them. Many Aboriginal groups take the position that UNDRIP is currently legally binding in Canada and that the guidelines should require obtaining the free, prior, and informed consent of the affected Aboriginal groups in any consultation.

By way of background, the UN General Assembly adopted UNDRIP in September 2007. 143 countries voted in favour of it, 11 abstained, and 4 countries voted against it: Canada, the United States, New Zealand and Australia. All four countries have since endorsed it, although each stated at the time of endorsement that UNDRIP is not legally binding.¹¹⁶

In its Statement of Support in November 2010, Canada reaffirmed its commitment to “promoting and protecting the rights of Indigenous peoples at home and abroad” but took the position that UNDRIP is an “aspirational document” and does not change Canadian laws or reflect customary international law. Canada also reiterated its concerns with various provisions, including FPIC when used as a veto.

UNDRIP stipulates that states must obtain the “free, prior, and informed consent” of Aboriginal groups in several instances, including but not limited to:

Article 19 – States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affected them.

Article 29(2) – States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 32(2) – States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As discussed above, Canadian courts have held in several cases that UNDRIP, and by association FPIC, is not currently legally binding in Canada and does not change Canada’s domestic laws with respect to the duty to consult.¹¹⁷ However, the new federal and Alberta

¹¹⁶ New Zealand, *Supporting UN Declaration restores NZ’s mana*, online: <http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>, April 20, 2010; US Statement Department, *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples*, online: <http://www.state.gov/documents/organization/184099.pdf>; Minister Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, online: http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf; Aboriginal Affairs and Northern Development Canada, *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>, November 10, 2010.

¹¹⁷ *Nunatukavut Community Council v. Canada*, [2015] F.C.J. No. 969 (FC) at paras. 103-4 (“*Nunatukavut*”); *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, [2013] F.C.J. 927 (FC) at para. 51; *Shuneymuxw First Nation v. Board of Education – School District #68*, [2014] B.C.J. No. 1343 (SC) at para. 59; *Gitxaala Nation v. Canada*, [2015] F.C.J. No. 289 (FCA) at para. 16.

governments have committed to implementing UNDRIP, including FPIC. On May 10, 2016, the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, announced at the UN Permanent Forum on Indigenous Issues that “Canada is a full supporter of the Declaration without qualification” and that Canada intends “nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.”¹¹⁸ The federal government has indicated that it will work in partnership with First Nations, Inuit and Métis on the best approach to implement UNDRIP as well as with other affected stakeholders, including provinces, territories and industry.¹¹⁹

Aboriginal groups have advocated for the implementation of UNDRIP since 2007 but other affected stakeholders, particularly in the resource development industry, have raised serious concerns about the implementation of the FPIC provisions. While these provisions could be implemented in a way that is consistent with Canada’s legal and constitutional framework, they are very broadly worded and open to multiple interpretations. Depending on how they are interpreted, these provisions could go substantially beyond what is currently required in Canadian law. For example, unlike the duty to consult, the requirement for FPIC in UNDRIP is technically not limited to impacts on asserted or established Aboriginal or treaty rights and applies more broadly to any impacts on Aboriginal peoples. In the context of legislation, this could require FPIC for virtually any legislation of general application passed by the federal government, although others have suggested a more narrow interpretation.¹²⁰

In addition, the FPIC provisions in UNDRIP as drafted do not give any express consideration to the strength of the claim, the nature of the impact of the proposed activity, and the balancing of competing interests. While there are strong Aboriginal rights and title claims, there are also tenuous claims, tenuous aspects of claims, many overlapping claims, and significant differing interpretations of certain treaty rights. There are also many instances where the impacts could be minimal or short-term and/or there are compelling societal interests to balance.

However, the overriding concern with FPIC amongst industry is whether it will be interpreted as a veto against Crown-decision making, effectively providing Aboriginal groups with a final say over any resource development that may impact their asserted or established rights or take place within their traditional territories. This could create significant uncertainty and deter investment in future and existing projects, particularly where a project may impact more than one Aboriginal group. For example, what would happen if there is a resource development project that 5 affected Aboriginal groups consent to and 1 opposes and the impacts at issue are found not to be significant? The issue is even more problematic for linear projects where achieving the consent of all potentially affected Aboriginal groups is virtually impossible.

There is currently no consensus in Canada on what obtaining “free, prior, and informed consent” requires and whether it constitutes a veto. Some Aboriginal leaders see it as a right to veto projects and/or communicate it in a way that can reasonably be interpreted as a veto – i.e. X

¹¹⁸ Speaking Notes for the Honourable Carolyn Bennett to the UN Permanent Forum on Indigenous Issues on May 10, 2016, online: <http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>. It is important to underscore that this new position will not affect existing Canadian law until the provisions of UNDRIP are implemented by the federal government. It will also not impact provincial or territorial government decision-making unless and until these governments take steps to implement UNDRIP within their respective jurisdictions. Even then, the extent to which Canadian law may be substantively impacted will depend on Canada’s interpretation of the UNDRIP and the manner in which it decides to carry out implementation.

¹¹⁹ Minister Bennett Clarifies Position on Implementing UNDRIP and FPIC, *Northern Public Affairs*, May 4, 2016, online: <http://www.northernpublicaffairs.ca/index/minister-bennett-clarifies-canadas-position-on-implementing-undrip-and-fpic/>.

¹²⁰ James Anaya, “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples”, July 15, 2009, paras. 46-47

cannot happen without our free, prior and informed consent. However, some Aboriginal participants in this process indicated that there is a distinction between consent and veto and that FPIC is not a veto. This view is supported by others, such as James Anaya, the former UN Special Rapporteur on Indigenous Rights. In a 2009 report, he stated:

In all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated, this requirement does not provide indigenous peoples with a "veto power", but rather established the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation or consent as they have developed in international human rights law and have been incorporated into the Declaration.¹²¹ (emphasis added)

This approach of making FPIC the objective of consultation is consistent with the approaches being taken in several other jurisdictions. However, even making FPIC the objective of consultation raises significant questions like what efforts are required in a given situation to attempt to achieve consent. It also raises questions about existing projects that have proceeded without the consent of Aboriginal groups due to the right of redress for past actions taken without FPIC under Article 28 of UNDRIP.¹²²

While all of these issues can be addressed in an appropriate way, these and other concerns relating to FPIC highlight the need for the federal government to move cautiously and thoughtfully in any efforts to implement FPIC, taking into account the wide range of interests that could be impacted and the need for predictability and certainty for future resource development. This will require significant consultation with Aboriginal groups, the provinces, territories, and industry given that there could be different standards applied to the same project. It also requires defining who it applies to and significant thought with respect to its application in the context of historic and modern treaties.

In addition, any consideration of this issue must take into account the existing Canadian constitutional framework which requires the balancing of rights and interests and where Aboriginal rights are protected but not absolute. As former Supreme Court Justice Ian Binnie aptly stated in *Mikisew Cree*, "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." Balancing competing interests, give-and-take, and compromise have been key components of the duty to consult and our constitutional framework and need to remain so if we are to truly advance reconciliation. In the words of Supreme Court

¹²¹ James Anaya, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples", July 15, 2009, para. 48. See also Megan Davis, "Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples" [2008] MelbJIntLaw 17, Melbourne Journal of International Law.

¹²² Article 28 of UNDRIP provides that "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

Chief Justice Beverley McLachlin in *Taku River*, “Compromise is inherent to the reconciliation process.”¹²³

As the federal government proceeds with implementing UNDRIP in consultation with affected parties, it should clearly define what FPIC means and set out what is expected of all parties. This is not something that should be left to be worked out through the courts. There have been hundreds of court cases over the last 10 years to work out the parameters of the duty to consult and in many cases this has harmed the cause of reconciliation. It has also had significant economic costs. This does not need to be repeated. While some litigation is evitable, leaving this issue to be defined by the courts will likely undermine efforts to improve federal-Aboriginal relations and have significant and unnecessary financial costs for Aboriginal communities, federal, provincial and territorial governments, third parties and the Canadian economy. All parties need legal and practical certainty of what may be required going forward.

RECOMMENDATIONS

- 40. Canada should conduct substantial consultations with Aboriginal groups, industry and provincial and territorial governments to define what FPIC means, when it is required and what efforts are required to achieve it, what happens if FPIC is not achieved, how the justification defence applies in cases of infringement, and how the government will deal with conflicting positions of affected Aboriginal groups on proposed Crown conduct.**

JUSTIFICATION

In addition to consent, many Aboriginal groups also raised concerns about the lack of guidance on justification for infringements of established Aboriginal or treaty rights, including Aboriginal title. Some Aboriginal groups with established fishing rights feel that the federal government gives almost no weight to the distinction between asserted and established rights in consultation and the need to justify infringements. Some federal officials also raised concerns with the lack of guidance in this area and indicated that they want greater guidance on what they should be doing where justification may be required.

By way of background, the Crown is required to justify any infringement of established Aboriginal or treaty rights. Justification and the duty to consult are distinct but related legal doctrines and justification is increasingly being raised in the context of consultation. In this engagement, it appeared that some participants were equating an “impact” on an established Aboriginal or treaty right to an “infringement”. It is important to underscore that not every action that impacts an Aboriginal or treaty right constitutes an infringement. The impact must result in a meaningful diminution of the right, which must take into account the characteristics and incidents of the right at issue.¹²⁴ As stated by the SCC in *Grassy Narrows*:

“Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para. 48).”¹²⁵

¹²³ *Taku River* at para. 2.

¹²⁴ The Supreme Court has articulated three factors that aid in determining whether an infringement has occurred: (i) is the action unreasonable (ii) does the action impose undue hardship and (iii) does the action deny the rights-holders their preferred means of exercising the right. See *Sparrow*; *Tsilhqot'in Nation* at para. 122; *Grassy Narrows* at para. 52.

¹²⁵ *Grassy Narrows* at para. 52.

Aboriginal title is different from other Aboriginal or treaty rights for the purposes of infringement because any use of the land without consent is an infringement. The SCC has held that the Crown must meet the following requirements to justify an infringement in the context of Aboriginal title:

- (i) It complied with its procedural duty to consult and accommodate;
- (ii) The action is backed by a compelling and substantial legislative objective; and
- (iii) The governmental action is consistent with the Crown's fiduciary duty to the group.¹²⁶

To date, there has been no case where a Court has done a full justification analysis and determined that an infringement is justified.¹²⁷ A justification trial is, however, currently underway in British Columbia for five West Coast Vancouver Island First Nations which have a recognized "right to fish and sell fish", with the exception of the geoduck fishery.¹²⁸

While there is currently only one area where Aboriginal title has been recognized in Canada, there are many Aboriginal groups with treaty rights and other established Aboriginal rights. The federal government needs to have a framework to approach justification for potential infringements, particularly in the fisheries context. This is also needed in the resource development context where claims to Aboriginal title are strong and there is a risk of an Aboriginal title declaration during the life of the project. This will likely become an increasing focus in future litigation if it is not adequately addressed. This should be avoided by proactively developing and implementing guidance on justification, which is better suited to advance the ultimate goal of reconciliation.

RECOMMENDATIONS

- 41. Canada should clarify in the new guidance for federal officials and industry that the federal government has a duty to justify any infringements of established Aboriginal or treaty rights in the absence of consent and explain what constitutes an infringement in specific contexts, what is required to satisfy the justification test, and what additional steps should be taken in consultation and accommodation if there is the potential of an infringement.**

¹²⁶ This requires that (i) the incursion on Aboriginal title cannot substantially deprive future generations of the benefit of the land (ii) the incursion is necessary to achieve the Crown's objective (rational connection) (iii) The Crown is going no further than necessary to achieve it (minimal impairment) and (iv) the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).

¹²⁷ The cases have been resolved in one of three ways: (a) new trial or further hearing was ordered because of the lack of evidence of justification; (b) the Court found that there was no infringement of a s. 35 right and therefore did not consider justification or (c) the Court was not satisfied that the government was pursuing a valid legislative objective and thus did not complete the justification analysis. See Peter W. Hogg & Daniel Styler, "What Counts as Justification Under Section 35?" January 13, 2015.

¹²⁸ *Ahousaht Indian Band and Nation v. Canada*, [2013] B.C.J. No. 1406 (CA) (leave to appeal to SCC denied)

VI. CLARIFYING ROLES AND IMPROVING OVERSIGHT, COORDINATION AND IMPLEMENTATION

Clarifying Roles and Responsibilities of Industry

Most Aboriginal groups accepted that the Crown can delegate or rely on proponents to fulfill certain procedural aspects of consultation and that proponents are best placed to answer questions about their project and deal with at least some aspects of accommodation. However, some Aboriginal groups felt that the federal government relies too heavily on industry and were upset by the perceived casual nature with which Canada delegates consultation. They, and many industry proponents, are frustrated by the lack of clarity and transparency about which aspects of consultation the federal government expects industry to undertake and which it remains responsible for. Many federal officials also acknowledged that there was room for improvement in this area.¹²⁹



This is not a new issue. Mr. Eyford raised this in his report *Forging Partnerships, Building Relationships* and it is why he recommended that Canada “develop a policy framework clearly setting out the respective roles and responsibilities of Canada and industry with respect to Aboriginal consultations.”¹³⁰ Canada’s response to this recommendation was the Draft Public Statement. While it is a relatively good motherhood statement on Canada’s approach to consultation and accommodation, it unfortunately does not provide any additional clarity on the respective roles and responsibilities of industry and the federal government.

This issue needs to be addressed with clear guidance explaining what the federal government may delegate to industry proponents and what the federal government remains responsible for.¹³¹ Other provinces like British Columbia and Saskatchewan have provided clearer guidance on this and Canada should follow suit.

In addition, Canada should be more transparent about what it is delegating to or relying on proponents for in any given case. The 2011 Guidelines state that the “Crown should clearly communicate what is expected of third parties to industry proponents, Aboriginal groups and various stakeholders” but this does not appear to be happening in practice. Other jurisdictions like Nova Scotia and Saskatchewan have taken a more proactive approach by sending formal letters of delegation to proponents (copied to affected Aboriginal groups) setting out what is being delegated to and expected of proponents. This is a good practice that federal

¹²⁹ The 2011 Guidelines provided limited guidance on what specifically industry may be responsible for. It states in the Consultation Directive to Guiding Principle No. 7 that Canada can “rely on its partners such as Aboriginal groups, industry and provinces and territories, to carry out procedural aspects of a consultation process (e.g. information sessions or consultations with Aboriginal groups, mitigation measures and or other forms of accommodation, etc.)”

¹³⁰ Douglas Eyford, *Forging Partnerships, Building Relationships*, p. 36.

¹³¹ There were some federal officials in this engagement who took the position that Canada relies on proponents to fulfil certain aspects of the duty to consult but does not delegate per se. In my view, this is a distinction without a difference for Aboriginal groups and industry. Whether it is reliance or delegation, there needs to be greater clarity and formality so all parties can understand what is expected. Any use of the term “delegation” in this report and its recommendations should be read to include any reliance on proponents, regardless of whether there is formal delegation.

departments and agencies should emulate in order to clarify expectations and provide greater formality and transparency around delegation or reliance proponents.

RECOMMENDATIONS

- 42. Canada should explain in the new guidance for federal officials and industry which “procedural aspects” of the duty to consult that it may delegate to or rely on industry proponents for and what the federal government remains responsible for. Canada should also ensure any federal delegation or reliance on an individual proponent is in writing and specifies what the proponent is expected to do and what Canada remains responsible for.**

IMPROVING CANADA'S APPROACH TO SCOPING

One issue relating to roles and responsibilities that was frequently raised by industry was the federal government's approach to identifying which Aboriginal groups should be consulted on particular Crown decisions (also referred to as scoping). There is a perceived lack of science in the federal government's approach and a lack of consistency both within the federal government itself and with the provinces. Aboriginal groups and federal officials also raised concerns about the sufficiency of existing guidance in this area.

Throughout the engagement, I heard many examples of how the federal government is falling short on this issue. I was told about a project where the province had directed the proponent to consult with three potentially affected Aboriginal groups and a year later Canada notified the proponent that they needed to consult with four groups and then added three additional groups over the course of the next year. Another federal agency instructed a proponent to consult with an Aboriginal group over 1000 km from a proposed mine. A third industry proponent of linear projects told me that the radius that a federal agency uses to identify potentially impacted Aboriginal groups changes with each of their projects (i.e. 30 km, 60 km or 100 km) and there appears to be no rationale behind these changes, such as potential impacts or the nature of the project.



The lack of consistency among governments creates unnecessary uncertainty and frustration for industry. Adding Aboriginal groups mid-way through the consultation process can be very disruptive and costly and creates risks of project delays. There will inevitably be certain discrepancies between federal, provincial, and territorial scoping because these different levels of government do not always recognize the same Aboriginal groups.¹³² There may also be Aboriginal groups added if information on the scope of potential impacts changes. However, the problem goes far beyond this as illustrated by the examples above.

There are three main issues that need to be addressed in this area.

First, Canada needs to clarify who is responsible for determining which Aboriginal groups need to be consulted if the duty to consult is triggered. The current division of responsibility between Canada and proponents is inconsistent across the federal government. Some federal agencies see this as a Crown responsibility. However, in other cases, the responsibility for identifying

¹³² For example, British Columbia does not consult with the Métis whereas Canada does.

groups falls more heavily on proponents and additional groups may or may not be added by the department or agency at some point in the future.

The federal government should adopt a consistent approach to this issue. In my view, the relevant federal department or agency should be responsible for determining who needs to be consulted. Canada can delegate or rely on proponents to fulfill procedural aspects of the duty to consult but it needs to set the rules of the game before it does so. Other jurisdictions like British Columbia, Alberta and Saskatchewan take a more proactive role in doing this before delegating procedural aspects of the duty to consult and Canada should do the same.

Second, proponents need guidance on whom to consult before the regulatory process formally begins both for early engagement and to be aware of any inconsistencies when the project is also regulated by another level of government. Since the federal regulatory process frequently starts later than provincial or territorial regulatory processes, there should be an avenue for proponents to find out in advance whether Canada will require consultation with additional Aboriginal groups. The Government of Alberta has set up a pre-consultation assessment request system through which proponents can seek early direction on consultation requirements. Canada should look at adopting a similar system for the early identification of which Aboriginal groups need to be consulted.

Third, the federal government should develop a common set of criteria for federal officials to use to determine which Aboriginal groups may be adversely impacted by a decision. Federal departments and agencies currently have different approaches. Some use proximity while others look more broadly at potential impacts based on watersheds and airsheds. Several Aboriginal groups raised concerns with the use of proximity and the instruction in the Draft Proponent Guidance that “proponents are expected to identify Aboriginal groups in the proximity of its proposed project.” There are obvious issues with using proximity, particularly in the fisheries context as Aboriginal groups with asserted or established rights upstream or downstream a project may be impacted even though they are not in close proximity. Proximity is a factor to consider but it should not be the only determinant.

Finally, the federal government needs to better explain why it may identify further Aboriginal groups in addition to those identified by the provinces and territories and work with these governments to minimize these inconsistencies to the extent possible. Many industry proponents were concerned by the statement in the Draft Proponent Guidance that “for a variety of reasons, it is possible that the Government of Canada might consult with a different list of Aboriginal groups compared to those groups with whom a proponent has already met.” Proponents require certainty and these divergent approaches need to be minimized to the extent possible and better explained when this cannot be avoided.

RECOMMENDATIONS

- 43. Canada should clarify in the new guidance for federal officials and industry that federal departments and agencies are responsible for determining which Aboriginal groups need to be consulted on a particular decision once a federal regulatory process has been initiated and ensure that all departments and agencies take a consistent approach to the identification of potentially impacted Aboriginal groups through the development of common criteria.**
- 44. Canada should establish mechanisms that enable proponents to get early direction on which Aboriginal groups need to be consulted for a particular project and work with provinces and territories to identify ways to minimize**

inconsistencies in the approaches to identifying potentially affected Aboriginal groups for consultation on particular projects.

Providing Greater Crown Oversight of Proponents

Proponents vary widely in their knowledge and experience with consultation and accommodation and Aboriginal groups frequently raised concerns regarding the federal government's level of oversight of proponents. Many feel that the federal government has been absent and has failed to resolve issues that arise with proponents.

Many industry proponents are also frustrated by the lack of oversight and would like the federal government to play a greater role in facilitating the consultation process, particularly in cases where there is an impasse or issues that only the federal government can deal with. They struggle with not knowing what is expected, particularly given the differing approaches taken by the federal, provincial and territorial governments. They also in some instances feel caught in the middle on issues unrelated to their projects and want greater leadership from the federal government to bring protracted consultations to a close. Some proponents were frustrated by Canada's insufficient action to address long-standing Aboriginal concerns and resolve Aboriginal rights and title assertions which are creating uncertainty for resource development and resulting in some projects being used to advance broader concerns with the federal government.

Given that the Crown remains responsible for the duty to consult, the federal government should maintain oversight over proponents throughout the process. This is important not only for ensuring that the duty to consult is met but also for the Crown's relationship with Aboriginal groups, which can be undermined by a lack of involvement of the Crown.

Federal departments and agencies differ in their approaches to this issue and there is currently no guidance on how best to exercise this oversight function.¹³³ Guidance should be provided but it will depend on the nature of the issue subject to consultation, the issues that arise in the consultation itself, and the particular proponent's capacity for consultation, which should be assessed at the outset. It should, however, include monitoring the progress of the consultation, being available to help resolve any impasses, meeting with affected Aboriginal groups if necessary to discuss any issues that cannot be addressed by proponents or are outside of any applicable regulatory process, assessing and providing direction to proponents on the adequacy of consultation and any proposed accommodation measures, and how to bring consultation to a close when there continue to be disagreements between proponents and Aboriginal groups.

¹³³ The 2011 Guidelines do provide a series of questions that departments and agencies need to consider before they decide whether or not and to what extent they will rely on third parties for consultation in general but these questions do not consider the capacity of individual proponents or provide any direction on continued Crown oversight.

RECOMMENDATIONS

- 45. Canada should provide guidance to federal officials on the need for federal oversight when relying upon or delegating procedural aspects of the duty to consult to industry proponents and how this oversight should be provided.**

Improving Internal Oversight and Coordination

One of the most commonly raised issues in the engagement was not the guidance itself but the implementation of the guidance by federal departments and agencies, or lack thereof. Aboriginal groups and industry frequently expressed frustration that every federal department and agency seems to have a different approach to consultation and that this approach is not always consistent even within departments. There are many factors contributing to this divergence, several of which have been previously addressed.¹³⁴ This remaining section will focus on improving information sharing, oversight and coordination.

OVERSIGHT AND COORDINATION

The level of oversight and coordination of consultation activities within the federal government varies, particularly as between major projects and all other Crown decisions. As stated earlier, the federal government established MPMO and NPMO to provide greater central oversight of regulatory processes for resource development including consultation. The reaction to MPMO and NPMO in this engagement was mixed. Some industry proponents indicated that they have provided significant value and have substantially improved coordination. Others said that they lack the teeth to ensure coordination, are under resourced, and in the case of MPMO is a single window into a lot of other windows.

Some Aboriginal groups welcomed the recent creation of MPMO West in response to Mr. Eyford's report *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*. However, they felt that there had not been sufficient time to assess its effectiveness. CEAA was seen by many as an effective coordinator but both industry and federal officials noted that there was insufficient coordination between departments and with the provinces in the permitting stage post-EA when CEAA is no longer involved.

The most significant implementation concerns, however, were for decisions outside of the major projects context. Aboriginal groups indicated that decision-makers without the support of CEAA or MPMO do not have the tools and resources needed to implement the highly structured process described in the 2011 Guidelines. Instead, they see the consultation process often follow an informal notice/comment process in place before federal and provincial governments began developing guidelines on consultation.

The 2011 Guidelines encourage and provide guidance to federal departments and agencies on developing a departmental or agency approach to consultation and accommodation but unfortunately this guidance has not been effectively or consistently implemented.

First, it does not appear that all departments and agencies have done a comprehensive assessment of when their existing activities, policies and programs may trigger the duty to consult and integrated this requirement into their decision-making processes as directed in Guiding Principle No. 2 of the 2011 Guidelines. As discussed earlier, there is currently no

¹³⁴ This includes a lack of sufficient guidance particularly outside of the major projects context, a lack of federal capacity, insufficient information sharing, the absence of a mechanism to ensure that issues that go beyond the mandates of departments and agencies are appropriately dealt with.

requirement for departments and agencies to complete an assessment of potential consultation or accommodation requirements for any new policy, plan or program proposals submitted to Cabinet for approval. In my experience, this has in some cases resulted in the duty to consult being flagged very late in the decision-making process.

Second, many departments and agencies do not have significant senior oversight over consultation and accommodation activities within their organizations to ensure consistency and accountability. Some departments have consultation and accommodation units but these units are often more focused on providing policy advice and most do not carry out consultations or always provide significant oversight of areas of the department that do. They are also typically located within a particular sector of a department which structurally limits their ability to provide oversight.¹³⁵ The result is that different sectors or regions of the same department or agency may take a different approach on basic issues like the timing of notification and the extent of the information provided.

Third, there is no effective mechanism to ensure consistency of approach across departments and agencies on consultation, including consistency in the additional guidance documents and tools that have been developed. There are numerous examples of federal department and agency guidance documents that I have reviewed in the course of the engagement that are not consistent with the 2011 Guidelines or with each other.

This is not to say that there are no coordination mechanisms outside of major projects. As discussed above, there is a Consultation and Accommodation Interdepartmental Team and regional federal networks of consultation practitioners, among other things. Federal officials find these to be helpful tools but not all departments regularly participate or share all of their internal guidance and tools to ensure consistency. There is also no mechanism to resolve disputes between departments and agencies beyond the powers of persuasion in the context of major projects or a mechanism to ensure higher level oversight and coordination on consultation outside of major projects. This has resulted in issues not being addressed or political staff and Ministers having to resolve these disputes in an ad hoc fashion.

Some Aboriginal groups and industry organizations pushed for a new central oversight body with teeth that can hold departments and agencies accountable and ensure consistency with the guidelines. Others suggested that this should be done by the Privy Council Office or INAC supported by a Cabinet Directive. There was also some support, particularly among industry, for a new central Consultation Secretariat for the entire federal government that would conduct all consultations on behalf of departments and agencies, similar to what has been done in Alberta.

I agree that there needs to be much greater oversight. However, I think the majority of this increased oversight should come at the department and agency level. Departments and agencies should remain responsible for consultation obligations within their respective mandates but there needs to be greater senior oversight to ensure that consultation and accommodation obligations are met and that consultation is being undertaken in a consistent and coordinated way, with appropriate quality improvement objectives and performance measurements. This likely can be accomplished through a Cabinet Directive on consultation and accommodation similar to the recent Cabinet Directive on modern treaty implementation.

¹³⁵ The limited senior level oversight within INAC on consultation and accommodation and the lack of authority of INAC's Consultation and Accommodation Unit to ensure that all sectors of INAC fully implement the duty to consult was noted in a November 2014 *Audit of Consultation and Accommodation* of the Audit Assurance Services Branch of INAC. See <https://www.aadnc-aandc.gc.ca/eng/1427813070494/1427813119878>.

However, this oversight cannot just be vertical and limited within departments and agencies. There should be central horizontal oversight mechanisms to ensure greater coordination and consistency and that departments and agencies are effectively discharging Canada's consultation obligations. This central oversight could also ensure that any changes to Canada's approach to consultation and accommodation are effectively implemented. To be clear, this increased oversight is not intended to stifle creative approaches or mandate uniformity. It is to ensure that all departments and agencies are paddling in the same direction, that Canada is discharging its obligations, and there are mechanisms to resolve disputes between departments and agencies over jurisdiction, approaches, and information sharing.

There are a number of options to achieve this increased oversight, such as providing additional authority to INAC or MPMO¹³⁶ or using the existing central authority of the Privy Council Office or Treasury Board. The latter two are often pointed to because they already have the required authority but this does not mean the authority might be better assigned elsewhere given existing infrastructure and mandates. Regardless of how this is structured, it should be supported by an existing or newly established Deputy Ministers Committee to ensure higher-level oversight and priority on issues relating to consultation, accommodation and relationship building.

RECOMMENDATIONS

- 46. Federal departments and agencies should enhance senior oversight over consultation and accommodation within their respective mandates to ensure greater coordination of consultation activities, consistency in approach, and that Canada is meeting its legal obligations.**
- 47. Canada should enhance central oversight and coordination on consultation and accommodation to ensure consistency in guidance and approaches, greater coordination of consultation activities, effective implementation of any changes to Canada's approach to consultation and accommodation, and that departments and agencies are discharging their consultation and accommodation obligations. This oversight should include a new or existing Deputy Ministers Committee focused on issues relating to consultation, accommodation and relationship building.**

CONCLUSION

The federal government has much work ahead to improve Canada's approach to consultation and accommodation and its relationship with Aboriginal peoples.

The new federal government has made a number of commitments in this area and it will no doubt be engaging on these issues in the coming months. It is my hope that this report and its recommendations can contribute to this dialogue.

¹³⁶ There would be issues with assigning this authority to MPMO given its existing mandate which is limited to major projects. Many consultation issues fall outside of the major projects context and this is where greater oversight is most needed.

Consultation and accommodation offers a significant opportunity for Canada to improve its relationship with Aboriginal peoples and advance reconciliation if done properly. However, if done poorly, it can also further undermine the relationship and add to the list of grievances.

Improving Canada's approach on consultation and accommodation is not a simple task and it must be done in a way that appropriately takes into account the interests of affected third parties and provides legal and practical certainty for the future economic development of Canada. This will require greater collaboration with Aboriginal groups, provincial and territorial governments, and industry. It also necessitates simultaneous action in other related areas as consultation cannot be the only forum for the relationship with Aboriginal peoples and the federal government. It is a key tool but not a panacea. There need to be other effective processes to address Aboriginal concerns.

“Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.”

– Lamer C.J., *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108 (S.C.C.)

I hope that this report will assist in improving Canada's approach to this important issue. I sincerely thank all of the individuals and organizations that generously gave of their time to participate in this process and share their insights and concerns.

APPENDIX A

LIST OF ENGAGEMENT PARTICIPANTS

ABORIGINAL GROUPS & ORGANIZATIONS

Alexander First Nation
 Algonquin Anishinabeg Tribal Council
 Assembly of First Nations Chiefs of New Brunswick
 BC First Nations Energy and Mining Council
 Carcross Tagish First Nation
 Carrier Sekani Tribal Council
 Central Urban Metis Federation Inc.
 Coastal First Nations
 Champagne and Aishihik First Nations
 Congress of Aboriginal Peoples
 Council of Yukon First Nations
 Daylu Dena Council
 Ditidaht First Nation
 First Nations Fisheries Council of BC
 First Nations Summit
 Fort McKay First Nation
 Fraser River Aboriginal Fisheries Secretariat
 Gitga'at First Nation
 Haida Nation
 Haisla Nation
 Hul'qumin'um Treaty Group
 Huron-Wendat Nation
 Inuit Tapiriit Kanatami
 Kitsumkalum First Nation
 K'omoks First Nation
 Kwanlin Dun First Nation
 Kluane First Nation
 Kwilmu'kw Maw-klusuaqn, representing 12
 Mi'kmaq First Nations in Nova Scotia
 Meadowlake Tribal Council, including representatives from:

- Birch Narrows Dene Nation
- Buffalo River Dene Nation
- Waterhen First Nation; and
- Flying Dust First Nation

Métis Nation of Alberta
 Métis Nation of British Columbia
 Metlakatla Stewardship Society
 Mikisew Cree
 Mi'kmaq Confederacy of Prince Edward Island

INDUSTRY

BC LNG Alliance

Mississaugas of New Credit
 Musqueam Indian Band
 Native Council of Nova Scotia
 Nisga'a Nation
 Nunavut Tunngavik Inc.
 Nuu-chah-nulth Tribal Council, including representatives from:

- Ehattesaht First Nation
- Ucluelet First Nation
- Kyquout Checklesaht First Nation
- Nuchatlaht First Nation
- Ahousaht First Nation
- Tseshaht First Nation
- Tla-o-qui-aht First Nation
- Mowachant/Muchalaht First Nation

Office of the Wet'suwet'en
 Passamaquoddy Nation
 Prince Albert Grand Council
 Ross River Dena Council
 Saskatoon Tribal Council
 Sipekne'katik
 Six Nations of the Grand River
 St. Mary's First Nation
 Sto:lo Nation
 Ta'an Kwach'an Council
 Taku River Tlingit First Nation
 Te'mexw Treaty Association
 Teslin Tlingit Council
 Tr'ondek Hwech'in First Nation
 Tsawwassen First Nation
 Tseil-Waututh Nation
 Union of BC Indian Chiefs
 Waban-aki Nation

FEDERAL DEPARTMENTS, AGENCIES & BOARDS

Canada Nova Scotia Offshore Petroleum

Cameco Corporation
 Canadian Association of Petroleum Producers
 Canadian Energy Pipeline Association
 Chihong Canada Mining Ltd.
 CN Rail
 ConocoPhillips Canada
 Emera Inc.
 Goldcorp Inc.
 LNG Canada
 Mining Association of Canada
 National Aboriginal Forestry Association
 New Gold Inc.
 Saskatchewan Mining Association
 SaskPower
 The Sisson Partnership
 Spectra Energy
 Teck Resources Limited
 Yukon Chamber of Mines

Board
 Canadian Environmental Assessment Agency
 Canadian Northern Economic Development
 Office
 Canadian Nuclear Safety Commission
 Department of Fisheries and Oceans Canada
 Department of Justice Canada
 Environment and Climate Change Canada
 Health Canada
 Indigenous and Northern Affairs Canada
 Infrastructure Canada
 National Energy Board
 Natural Resources Canada, including the
 Major Project Management Office
 Parks Canada
 Port Metro Vancouver
 Public Works and Government Services
 Canada
 Transport Canada

PROVINCES

Government of British Columbia
 Government of New Brunswick
 Government of Nova Scotia
 Government of Saskatchewan

APPENDIX B

CONSOLIDATED LIST OF RECOMMENDATIONS

Setting the Foundation for Meaningful Consultation

1. Canada should reframe any new guidance documents on the duty to consult to have an overarching focus on how to build strong relationships with Aboriginal groups and advance reconciliation, with the duty to consult as an important tool and framework for this work. Canada should also provide guidance on what reconciliation means, why it is important, and how the duty to consult can assist with advancing it.
2. All federal departments and agencies should work with Aboriginal groups to identify key Aboriginal concerns within their respective mandates and set specific key priorities for improving the relationship with Aboriginal groups and advancing reconciliation, supported by training, performance measures, and appropriate oversight.
3. In order to facilitate and support future consultation, Canada should continue to work with Aboriginal groups, provinces, territories and affected third parties to develop a new framework for Aboriginal and treaty rights that will more expeditiously reach negotiated settlements of Aboriginal rights and title claims where possible and resolve disputes over the interpretation and implementation of treaties.
4. Canada should, in consultation with Aboriginal groups and industry, develop best practices for “early engagement” in specific contexts (i.e. particular types of resource development projects, policy development and fisheries, wildlife and land management decisions etc.) and provide more detailed guidance to federal officials and industry on the timing and purpose of early engagement.

Ensuring Meaningful Consultation

UNDERSTANDING AND ADAPTING CONSULTATION TO THE CONTEXT

5. Canada should ensure that federal officials involved in consultation participate in general and nation specific Aboriginal awareness training that is shaped and delivered by Aboriginal communities.
6. Canada should provide greater guidance and training on the Métis and Inuit, which explains who they are, how their asserted or established rights may differ from First Nations, key jurisprudence, and any other special considerations to be taken into account when consulting the Métis and Inuit.
7. Where possible, Canada should attempt to negotiate consultation MOUs with other provincial/territorial Métis organizations to provide single windows for Métis consultation in Manitoba, Saskatchewan, Alberta, British Columbia, and the Northwest Territories. Where this is not possible, Canada should identify and provide direction to federal officials and industry on the appropriate rights-holders to consult with for asserted or established Métis claims.

8. Canada should provide more comprehensive guidance to federal officials and industry on the potential scope, content, and tests to establish Aboriginal rights and title and work with Aboriginal groups, provincial, and territorial governments to enhance the Aboriginal and Treaty Rights Information System (“ATRIS”). This work should ensure that ATRIS includes all current land and marine based rights assertions, current land use and summaries of all available traditional land use studies, historic and current fishing practices, a list of any existing strength of claim assessments (for federal officials only), and up to date information on the status of and federal positions on any related Aboriginal rights and title litigation.
9. Canada should significantly enhance the training and information available on historic and modern treaties for the purposes of consultation, including providing more detailed and easy to understand information in ATRIS on the geographic scope and content of historic and modern treaty rights, any unresolved claims relating to the interpretation of those rights, and all consultation obligations in modern treaties.

ENSURING THE NECESSARY SKILLSET FOR CONSULTATION

10. Canada should identify the skillset required for meaningful consultation and ensure that officials with sufficient expertise and skills in Aboriginal consultation oversee the development of any consultation processes and facilitate any consultations with the support of appropriate subject matter experts within the federal government.

PROMOTING GREATER COLLABORATION IN THE PROCESS

11. Canada should provide more detailed guidance and tools to federal officials and industry on the range of Aboriginal interests that may need to be considered in an impacts assessment for consultation, how to assess the nature, degree, and likelihood of these impacts, and how to work with Aboriginal groups and incorporate Aboriginal perspectives and traditional knowledge in this area. Canada should also provide guidance on the reciprocal obligations and expectations of Aboriginal groups in providing information on adverse impacts to asserted or established rights.
12. Canada should work with the provinces and territories to take a coordinated approach to assessing and addressing cumulative effects on Aboriginal and treaty rights, including in the collection and sharing of regional baseline data, and provide more detailed guidance to federal officials and industry how to assess cumulative effects and the respective roles and responsibilities of Canada and industry in this area.
13. Canada should clarify for federal officials what is required for a “preliminary assessment” of strength of claim, who it should be conducted by, and what oversight measures will be put in place to ensure accuracy, consistency and sharing of relevant information. Canada should also provide guidance to federal officials on how to work with Aboriginal groups and proponents on issues relating to strength of claim in a way that ensures transparency and a respectful dialogue.
14. Canada should encourage federal officials and industry in any new guidance to seek input from Aboriginal groups on how they wish to be consulted for a particular decision and have regard to consultation policies of Aboriginal groups where reasonable and appropriate.

15. Canada should be more nuanced in its approach to consultation protocols, including having more prescriptive language or sub-protocols on specific issues where desired and entering into protocols with individual Aboriginal groups in areas of significant federal activity where this would bring needed clarity to the process.

ENSURING APPROPRIATE AND TIMELY INFORMATION SHARING

16. Canada should provide additional guidance to federal officials and industry on the type of information that should at a minimum be provided to Aboriginal groups at the outset of and during consultation on resource development projects, fisheries, wildlife and land management decisions, and policy, regulatory, and legislative changes.
17. Federal departments and agencies should develop reasonable and consistent timelines for consultation on specific types of federal decisions.

REFINING CANADA'S RELIANCE ON REGULATORY PROCESSES

18. Canada should ensure that federal officials engage with potentially affected Aboriginal groups prior to the commencement of NEB hearings for major projects and CEEA review panels in order to discuss concerns with the proposed project and identify any issues within federal jurisdiction that go beyond the mandate of the regulatory body and may require a separate process.
19. Canada should establish a process to assign responsibility for federal issues raised in consultation that fall outside the statutory mandates of the federal regulator(s) involved and empower a federal authority to assign responsibility for the issue if an agreement cannot be reached as between potentially affected departments and agencies.

IMPROVING CONSULTATION ON POLICY, REGULATORY AND LEGISLATIVE CHANGES

20. Canada should provide additional guidance to federal officials on when and how to consult on policy, regulatory and legislative changes that may adversely affect asserted or established Aboriginal or treaty rights. As part of this, Canada should require Memoranda to Cabinet to include an assessment of whether the duty to consult is triggered by any proposed changes and if so, who was consulted, what concerns were raised, and how they were addressed.
21. Indigenous and Northern Affairs Canada together with other key affected departments should engage with representatives of Aboriginal rights holders on consultation to discuss appropriate fora and processes for consulting on national policy, regulatory, and legislative changes that may adversely affect asserted or established Aboriginal or treaty rights.

ACCESS TO DECISION-MAKERS AND INCREASING TRANSPARENCY

22. Canada should ensure that senior federal officials receive appropriate training on the duty to consult and relationship building with Aboriginal groups that is tailored to the respective mandates and decision-making processes of their departments or agencies.
23. Canada should develop a consistent, transparent and timely approach to obtaining input from affected Aboriginal groups on the Crown consultation record before decisions are made and on reporting back to Aboriginal groups after decisions are made to explain how their concerns relating to adverse impacts on Aboriginal or treaty rights were taken into account in the consultation process.

IMPROVING CANADA'S APPROACH TO ACCOMMODATION AND CONSULTATION ADEQUACY

24. Canada should develop a more detailed policy framework on accommodation that identifies the nature and degree of impacts that may require accommodation, includes criteria to assess what is appropriate accommodation in the circumstances, provides general, sector and department specific accommodation examples (i.e. mining, pipelines, fisheries etc.), and outlines the roles and responsibilities of the Crown, proponents, and Aboriginal groups.
25. Canada should clarify the federal government's approach to accommodation for cumulative effects and impacts to Aboriginal title and cultural and spiritual practices, including setting out roles and responsibilities and ensuring that appropriate departments and agencies have the policy or statutory authorities to address these issues.
26. Canada should provide greater guidance to proponents on how to approach consultation and accommodation where there are overlapping claims and clarify the respective roles and responsibilities of the federal Crown and proponents.
27. Canada should provide guidance to federal officials that better explains the requirement of good faith in consultation and accommodation as well as how to assess the adequacy of consultation and any proposed accommodation before a Crown decision is made, which should include a set of specific factors or questions that are aligned with the criteria of meaningful consultation.

IMPROVING GUIDANCE TO PROPONENTS

28. Canada should develop more detailed and practical overarching guidance for industry on consultation and accommodation, which includes lessons learned by proponents and governments in key areas and answers to questions that proponents commonly raise with the federal government.
29. Federal departments and agencies that rely on proponents in any way for consultation should clarify what specific information proponents should obtain in consultation, what information should be reported to the federal government on their consultation activities, and what specific accommodation information that the federal government would like to receive from proponents relating to any agreements that they have with Aboriginal groups, with appropriate regard to maintaining the confidentiality of any commercially sensitive terms.

Enhancing the Capacity of Aboriginal Groups

30. Canada should implement a high-level central information management system for consultation activities of the federal government. This system should, at a minimum, contain all of the issues that a particular Aboriginal group has been or is being consulted on by federal departments and agencies, concerns that they raised in previous consultations, previous capacity funding, issues to flag for future consultation, and a contact name in the federal government for each previous consultation.
31. Federal departments and agencies should work to reduce capacity demands on Aboriginal communities, such as consolidating consultations on related issues, consulting on a suite of permits for a project at the same time, enhancing coordination

with the provinces and territories, building confidence in federal regulatory processes, and establishing strategic high-level tables in areas of frequent consultation.

32. Indigenous and Northern Affairs Canada should enter into MOUs on consultation and accommodation with all provinces and territories on a priority basis and identify concrete joint priorities with each province and territory aimed at improving coordination and information-sharing in each jurisdiction supported by action plans and accountability measures to ensure meaningful progress.
33. Canada should work with provinces, territories and Aboriginal groups to identify consultation skills gaps in Aboriginal communities and develop or support targeted skills-training and apprenticeship activities aimed at increasing local capacity for consultation as well as improve access to federal government expertise.
34. Canada should work with the provinces, territories, and industry to promote a principled dialogue about resource development with Aboriginal communities. This dialogue should be aimed at improving knowledge about the energy, mining and other resource sectors and how Aboriginal traditional knowledge and participation can enhance environmental monitoring and stewardship for projects.
35. Canada should direct federal officials to consider at the outset of consultation whether capacity support (financial or in-kind) is necessary to ensure meaningful consultation and to consider capacity when determining the adequacy of consultation. Canada should also provide criteria to assist with determining whether to provide capacity assistance, the nature of that assistance as well a consistent approach to determining the quantum of any financial assistance.
36. Canada should provide additional guidance to industry on the reasons for and benefits of providing capacity support, the range of support that can be provided, and factors to consider and information to request in order to determine an appropriate quantum of any financial assistance. This guidance should also encourage proponents to have early discussions with Aboriginal groups to determine whether capacity support is needed, outline the reciprocal obligations of Aboriginal groups in making capacity requests, and indicate that any capacity barriers and reasonable efforts or offers to address these barriers will be considered in assessing the adequacy of consultation.
37. Canada should work with the provinces and territories to incentivize aggregation of Aboriginal groups for consultation and to ensure that all Aboriginal groups receive core capacity funding for consultation and that Canada contributes core capacity funding where there is a need and a certain threshold of federal consultation activity.
38. Canada should ensure that all departments and agencies that engage in consultation with Aboriginal groups have the authority to flow capacity funding and identify ways to streamline the application and reporting processes for federal participant funding and incentivize aggregation for this funding.

Consent and Justification

39. Canada should clarify in the new guidance for federal officials and industry when it is necessary to obtain the consent of affected Aboriginal groups, from whom consent must be obtained, as well as provide best practices for achieving consent.

40. Canada should conduct substantial consultations with Aboriginal groups, industry and provincial and territorial governments to define what FPIC means, when it is required and what efforts are required to achieve it, what happens if FPIC is not achieved, how the justification defence applies in cases of infringement, and how the government will deal with conflicting positions of affected Aboriginal groups on proposed Crown conduct.
41. Canada should clarify in the new guidance for federal officials and industry that Canada has a duty to justify any infringements of established Aboriginal or treaty rights in the absence of consent and explain what constitutes an infringement in specific contexts, what is required to satisfy the justification test, and what additional steps should be taken in consultation and accommodation if there is the potential of an infringement.

Clarifying Roles & Improving Internal Federal Oversight and Coordination

42. Canada should explain in the new guidance for federal officials and industry which “procedural aspects” of the duty to consult that it may delegate to or rely on industry proponents for and what the federal government remains responsible for. Canada should also ensure any federal delegation to an individual proponent is in writing and specifies what the proponent is expected to do and what Canada remains responsible for.
43. Canada should clarify in the new guidance for federal officials and industry that federal departments and agencies are responsible for determining which Aboriginal groups need to be consulted on a particular decision once a federal regulatory process has been initiated and ensure that all departments and agencies take a consistent approach to the identification of potentially impacted Aboriginal groups through the development of common criteria.
44. Canada should establish mechanisms that enable proponents to get early direction on which Aboriginal groups need to be consulted for a particular project and work with provinces and territories to identify ways to minimize inconsistencies in the approaches to identifying potentially affected Aboriginal groups for consultation on particular projects.
45. Canada should provide guidance to federal officials on the need for federal oversight when relying upon or delegating procedural aspects of the duty to consult to industry proponents and how this oversight should be provided.
46. Federal departments and agencies should enhance senior oversight over consultation and accommodation within their respective mandates to ensure greater coordination of consultation activities, consistency in approach, and that Canada is meeting its legal obligations.
47. Canada should enhance central oversight and coordination on consultation and accommodation to ensure consistency in guidance and approaches, greater coordination of consultation activities, effective implementation of any changes to Canada’s approach to consultation and accommodation, and that departments and agencies are discharging their consultation and accommodation obligations. This oversight should include a new or existing Deputy Ministers Committee focused on issues relating to consultation, accommodation and relationship building.

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